

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

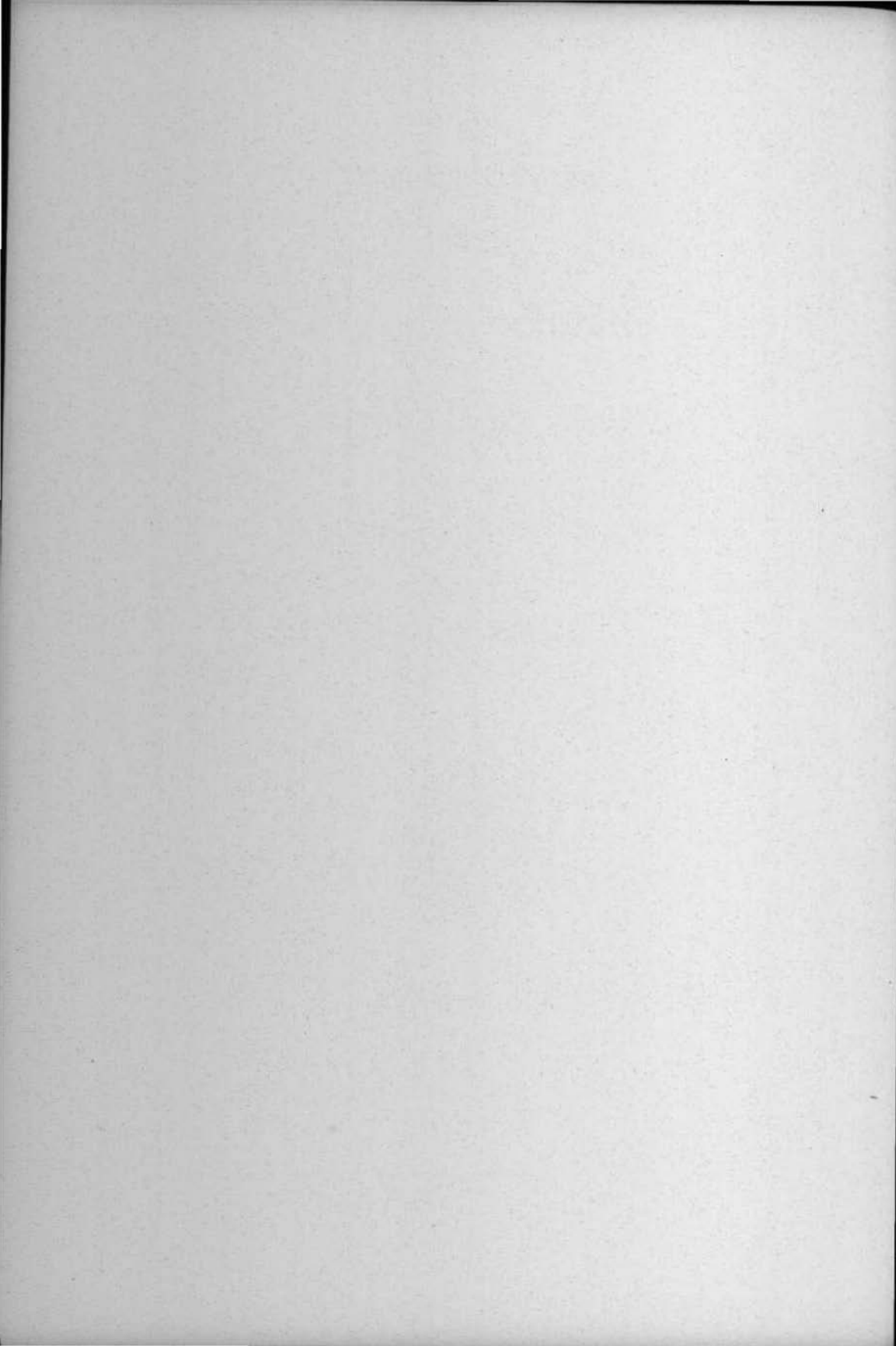
From January 1, 1951, to December 31, 1952

RICHARD W. ERVIN
Attorney General



Tallahassee, Florida

1952





STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

RICHARD W. ERVIN
ATTORNEY GENERAL

January 6, 1953

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE DAN McCARTY
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1951 through December 31, 1952. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts, of the receipts and expenditures of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

In keeping with the long established custom, this report, with a brief of all opinions of general interest rendered during two calendar years, includes a listing of former Attorneys General, the personnel of my office during the past two years, the membership of the Florida Supreme Court, Circuit Judges, Judges of the Courts of Record, the Courts of Crime, the Criminal Courts of Record, the Civil Courts of Record, Juvenile Courts and the County Judges. Listed also are the State Attorneys, the Assistant State Attorneys and County Solicitors.

Pertinent information, reports and statistics connected with the activities of my office and opinions rendered during the last biennium as printed herein will be found listed in the Table of Contents.

Respectfully submitted,
RICHARD W. ERVIN
ATTORNEY GENERAL

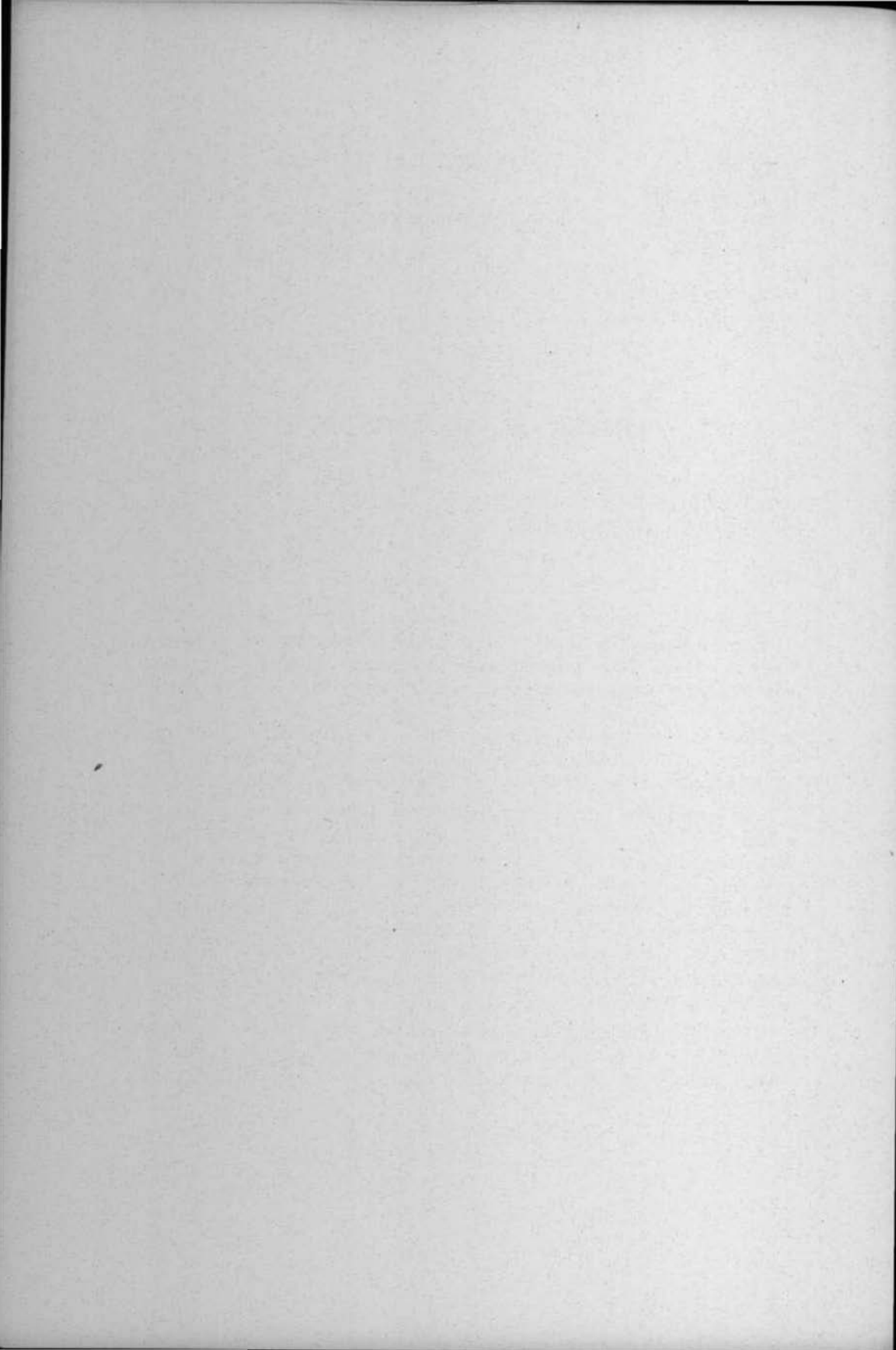


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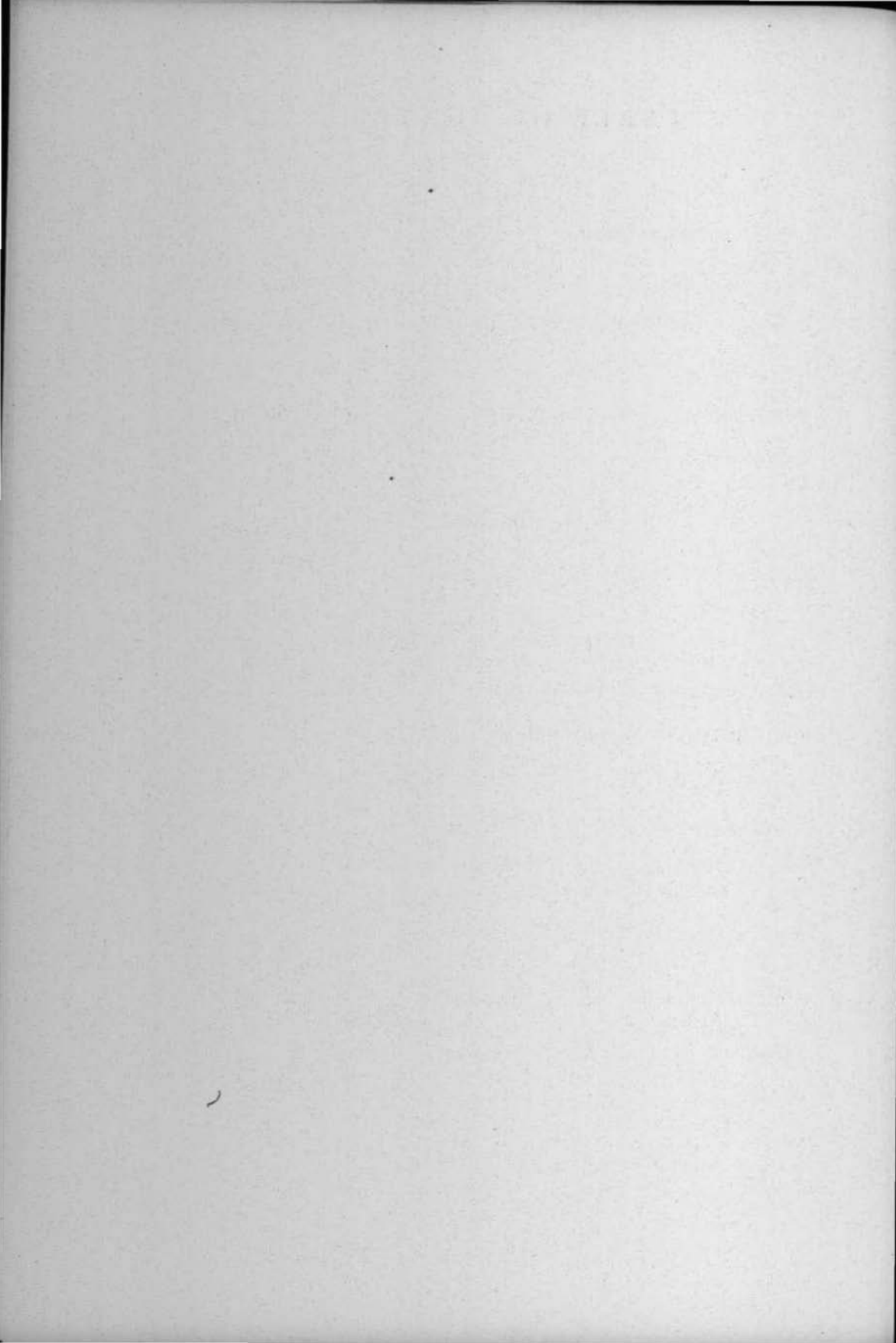
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ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISSBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-1949
RICHARD W. ERVIN	1949-

ATTORNEY GENERAL'S OFFICE

LEGAL DEPARTMENT

RICHARD W. ERVIN	Attorney General
J. ROBERT McCLURE	First Assistant
HOWARD S. BAILEY	Assistant
WILLIAM C. BOSTWICK	Assistant
REEVES BOWEN	Assistant
FRED M. BURNS	Assistant
*FRANK S. CANNOVA	Assistant
BART L. COHEN	Assistant
*PHILLIP GOLDMAN	Assistant
JAMES L. GRAHAM, JR.	Assistant
FRANK J. HEINTZ	Assistant
*MALLORY H. HORTON	Assistant
T. PAINE KELLY	Assistant
JOHN A. MADIGAN, JR.	Assistant
RALPH M. McLANE	Assistant
WILLIAM A. O'BRYAN	Assistant
RALPH E. ODUM	Assistant
B. JAY OWEN	Assistant
GEORGE E. OWEN	Assistant
*LEONARD PEPPER	Assistant
**GEORGE M. POWELL	Assistant
*MURRAY SAMS, JR.	Assistant
MARY SCHULMAN	Assistant
*BOONE D. TILLET, JR.	Assistant
JAMES B. TONEY	Assistant
**R. M. YENT	Assistant
R. E. BLACKBORN, JR.	Special Assistant
GEORGE EARL BROWN	Special Assistant
*WILLIAM M. COOKE	Special Assistant
*W. R. CULBREATH	Special Assistant
J. J. ENGLISH	Special Assistant
*T. FRANK HOBSON, JR.	Special Assistant
*JERRY R. HUSSEY	Special Assistant
*RUFUS O. JEFFERSON	Special Assistant
*WALTER C. KOVNER	Special Assistant
*W. ROBERT MANN	Special Assistant
*BEN F. OVERTON	Special Assistant
JOHN C. REED	Special Assistant
*ALLEN BRADFORD SMITH	Special Assistant
*THEODORE M. TRUSHIN	Special Assistant

LILLIAN S. RYDER	Secretary to Attorney General
SHIRLEY SWAIN	Secretary to First Assistant
BESSIE MARY ALLEN	Secretary
LEILA K. COFIELD	Secretary
LAVONNE CRANDALL	Secretary
GERALDINE CROMARTIE	Secretary
CAROLINE L. DEDGE	Secretary
PAULINE H. EVANS	Secretary
BETTY EPPES	Secretary
*SARA M. GAUNTT	Secretary
NINA LEE KINSEY	Secretary
WINIFRED KITCHING	Secretary
*FRIEDA MARTIN	Secretary
*JOYCE McDONALD	Secretary
*VIRGINIA H. MILLS	Secretary
*ALINE MORRIS	Secretary
ANNIE MARY PERKINS	Secretary
MINNIE D. PHILLIPS	Secretary
PEGGY SUE RUSS	Secretary
*AGNES H. SIBLEY	Secretary
*EUNICE SINGLETARY	Secretary
*MARTHA G. SMITH	Secretary
LILLIAN H. WALKER	Secretary
*IDA M. WHITTINGTON	Secretary
BETTY NELL WHITTLE	Secretary
RHONDA L. WOODBERY	Secretary
JOANNE M. ALLEN	Clerk
*LORA L. BRUGH	Clerk
MARJORIE ANN CURTIS	Clerk
*WARDENE EASTMAN	Clerk
*MARJORIE I. LLOYD	Clerk
MARGARET E. BLEDSOE	File Clerk
MARGUERITE E. KEEGAN	Assistant File Clerk
*DONALD L. FRASER	Law Clerk
*HELEN HARDAKER	Clerk Typist
GEORGIA K. BARBER	Opinion Editor
WILLIAM H. GASQUE	Special Investigator
LIDIE E. MOSS	Receptionist
HORTENSE K. WELLS	Librarian

*Resigned

**Deceased

ATTORNEY GENERAL'S OFFICE

STATUTORY REVISION

CHARLES T. HENDERSON --- Assistant Attorney General
Director of Statutory Revision and Bill Drafting

VIRGINIA SEARCY BARR Special Assistant
*CHARLES DE CARLO Special Assistant
*MAYO CHASE JOHNSTON Assistant
ROSE D. KITCHEN Special Assistant
**WILLIAM F. LEONARD Special Assistant
W. C. MORRIS Special Assistant
CLARENCE A. NEELEY Special Assistant
*J. B. SPENCE Special Assistant
*J. FRANKLIN WEST Special Assistant

JEWELL L. ROEMER Secretary to Director
***MARY GEORGE ANDERSON Clerk
***MABLE S. ARMES Clerk
DORA BELLE BROOKS Clerk
***JANE BULLARD Clerk
***EVELYN COGGESHALL Typist
EDITH GRADY COOMBS Verifier
***BETTY CRAWFORD Typist
***GARLON DAVIS Clerk
***JEFFERSON DAVIS Clerk
***JUNE DAVIS Secretary
***MARY H. ERWIN Typist
***VIRGINIA FOUNTAIN Clerk
DONALD HARTSFIELD Clerk Part-time
***HOMER HAYES Clerk
***BESSIE CAROL JOHNSON Clerk
***FRANCES JOHNSON Clerk
***LAURENCE KAVANAUGH Clerk
***JOHNNIE W. KEEFFE Clerk
***BETTY KERBY Clerk
***EDDY KILLGO Clerk
***ELSA S. LIPSEY Clerk
***JANE LOVE Clerk
***HOYT B. MASSEY Clerk
MARTHA S. PATTERSON Clerk
MARY O'Q. POMEROY Secretary
STELLA GLOVER POTT Typist
MARGARET F. SAMPEY Verifier
***EARL D. THOMPSON Clerk
JANE WILLIAMS Clerk Part-time

*Resigned to enter private practice.

**Military.

***Employment Terminated.

JUDICIAL DEPARTMENT OF FLORIDA

SUPREME COURT JUSTICES

TALLAHASSEE, FLORIDA

<i>Chief Justice</i>		<i>Term Expires</i>
H. L. SEBRING	Tallahassee	January, 1955

<i>Justices</i>		
**ALTO ADAMS	Tallahassee	January, 1955
ELWYN THOMAS	Tallahassee	January, 1957
B. K. ROBERTS	Tallahassee	January, 1955
***T. FRANK HOBSON	Tallahassee	January, 1957
*ROY H. CHAPMAN	Tallahassee	January, 1953
GLENN TERRELL	Tallahassee	January, 1955
JOHN E. MATHEWS	Tallahassee	January, 1955
E. HARRIS DREW	Tallahassee	January, 1959
GUYTE P. McCORD, Clerk Supreme Court.		
RICHARD W. ERVIN, Attorney General, Reporter to Supreme Court.		
DEMPSEY B. MAYO, Marshal.		
CARSON F. SINCLAIR, Librarian.		

CIRCUIT JUDGES

FIRST Judicial Circuit—Escambia, Okaloosa, Santa Rosa and Walton Counties.

L. L. Fabisinski	Pensacola, Florida
D. Stuart Gillis	DeFuniak Springs, Fla.

SECOND Judicial Circuit—Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla Counties.

Hugh M. Taylor	Quincy, Florida
W. May Walker	Tallahassee, Florida

THIRD Judicial Circuit—Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee and Taylor Counties.

R. H. Rowe	Madison, Florida
Hal W. Adams	Mayo, Florida

FOURTH Judicial Circuit—Duval, Clay and Nassau Counties.

Charles A. Luckie	Jacksonville, Florida
Bayard B. Shields	Jacksonville, Florida
A. D. McNeil	Jacksonville, Florida
Claude Ogilvie	Jacksonville, Florida

DUVAL COUNTY CIRCUIT—Duval County.

Edwin L. Jones	Jacksonville, Florida
----------------------	-----------------------

FIFTH Judicial Circuit—Citrus, Hernando, Lake, Marion and Sumter Counties.

Truman G. Futch	Tavares, Florida
F. R. Hocker	Ocala, Florida

SIXTH Judicial Circuit—Pasco and Pinellas Counties.

John U. Bird	Clearwater, Florida
John Dickinson	St. Petersburg, Fla.
Victor O. Wehle	St. Petersburg, Fla.
Orville L. Dayton, Jr.	Dade City, Florida

*Deceased.

**Resigned.

***T. Frank Hobson replaces H. L. Sebring as Chief Justice on January 13, 1953, to serve for a period of two years.

SEVENTH Judicial Circuit—Flagler, Putnam, St. Johns and Volusia Counties.

Geo. Wm. Jackson St. Augustine, Fla.
Herbert B. Frederick Daytona Beach, Fla.
P. B. Revels Palatka, Florida

EIGHTH Judicial Circuit—Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.

John A. H. Murphee Gainesville, Florida
A. Z. Adkins Starke, Florida

NINTH Judicial Circuit—Brevard, Indian River, Martin, Okeechobee, Orange, Osceola, St. Lucie and Seminole Counties.

M. B. Smith Titusville, Florida
A. O. Kanner Stuart, Florida
Frank A. Smith Orlando, Florida
Terry Patterson Winter Park, Florida

TENTH Judicial Circuit—Hardee, Highlands and Polk Counties.

Don Register Winter Haven, Florida
D. O. Rogers Bartow, Florida

ELEVENTH Judicial Circuit—Dade County.

Charles A. Carroll Miami, Florida
George E. Holt Miami, Florida
Stanley Milledge Miami, Florida
N. Vernon Hawthorne Miami, Florida
William A. Herin Miami, Florida
Marshall C. Wiseheart Miami, Florida
Grady L. Crawford Miami, Florida
Vincent C. Giblin Miami, Florida
Pat Cannon Miami, Florida
Wayne Allen Miami, Florida

TWELFTH Judicial Circuit—DeSoto, Charlotte, Collier, Glades, Hendry, Lee, Manatee and Sarasota Counties.

Lynn Gerald Fort Myers, Florida
W. T. Harrison Palmetto, Florida

THIRTEENTH Judicial Circuit—Hillsborough County.

L. L. Parks Tampa, Florida
Harry N. Sandler Tampa, Florida
H. C. Tillman Tampa, Florida
I. C. Spoto Tampa, Florida

FOURTEENTH Judicial Circuit—Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties.

E. Clay Lewis, Jr. Panama City, Fla.
E. C. Welch Marianna, Florida

FIFTEENTH Judicial Circuit — Broward and Palm Beach Counties.

C. E. Chillingworth West Palm Beach, Fla.
Geo. W. Tedder Ft. Lauderdale, Fla.
Joseph S. White West Palm Beach, Fla.
Lamar G. Warren Ft. Lauderdale, Florida

SIXTEENTH Judicial Circuit—Monroe County.

Aquilino Lopez, Jr. Key West, Florida

JUDGES AND SOLICITORS

BROWARD COUNTY CRIMINAL COURT OF RECORD

W. T. Kennedy Judge
Otis Farrington Solicitor

Ben C. Willard _____ Judge
John D. Marsh _____ Solicitor

William T. Harvey _____ Judge
Harry H. Martin _____ Solicitor

L. A. Grayson Judge
Paul B. Johnson Solicitor

Thomas S. Caro _____ Judge
Allan B. Cleare, Jr. _____ Solicitor

W. M. Murphy _____ Judge
Richard Cooper _____ Solicitor

Edward G. Newell _____ Judge
T. Harold Williams _____ Solicitor

Roy H. Amidon _____ Judge
Clifton M. Kelly _____ Solicitor

Ernest E. Mason _____ Judge
John L. Reese _____ Solicitor

W. Kenneth Barnes Judge
T. H. Getzen Solicitor

C. Richard Leavengood Judge

Dade County Hon. Ray H. Pearson, Miami

Dade County Hon. D. J. Heffernan, Miami
Hon. Norman Hendry, Miami
Duval County Hon. Burton Barrs, Jacksonville

Broward County	Hon. Dorr S. Davis, Ft. Lauderdale
Dade County	Hon. Walter H. Beckham, Miami
Duval County	Hon. W. S. Criswell, Jacksonville
Hillsborough County	Hon. Paul R. Kickliter, Tampa
Monroe County	Hon. Eva W. Gibson, Key West
Orange County	Mrs. Mattie H. Farmer, Orlando
Pinellas County	Hon. William G. Gardiner, St. Petersburg
Polk County	Hon. G. Bowdon Hunt, Bartow

FIRST Judicial Circuit _____ Ed Wicke, Pensacola
Escambia, Okaloosa, Santa Rosa and Walton Counties.

- SECOND Judicial Circuit William D. Hopkins, Tallahassee
Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla
Counties.
- THIRD Judicial Circuit Wm. Randall Slaughter, Live Oak
Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee
and Taylor Counties.
- FOURTH Judicial Circuit..... William A. Hallowes, III, Jacksonville
Clay, Duval and Nassau Counties.
- FIFTH Judicial Circuit A. P. Bine, Ocala
Citrus, Hernando, Lake, Marion and Sumter Counties.
- SIXTH Judicial Circuit Clair A. Davis, St. Petersburg
Pasco and Pinellas County.
- SEVENTH Judicial Circuit Murray Sams, Deland
Flagler, Putnam, St. Johns and Volusia Counties.
- EIGHTH Judicial Circuit T. E. Duncan, Gainesville
Alachua, Baker, Bradford, Gilchrist, Levy and Union Counties.
- NINTH Judicial Circuit Murray W. Overstreet, Kissimmee
Brevard, Indian River, Martin, Okeechobee, Orange, Osceola,
St. Lucie and Seminole Counties.
- TENTH Judicial Circuit Gunter Stephenson, Winter Haven
Hardee, Highlands and Polk Counties.
- ELEVENTH Judicial Circuit George A. Brantigam, Miami
Dade County.
- TWELFTH Judicial Circuit Wm. M. (Mack) Smiley, Bradenton
Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee and
Sarasota Counties.
- THIRTEENTH Judicial Circuit James M. McEwen, Tampa
Hillsborough County.
- FOURTEENTH Judicial Circuit J. Frank Adams, Blountstown
Bay, Calhoun, Gulf, Holmes, Jackson and Washington
Counties.
- FIFTEENTH Judicial Circuit Phil O'Connell, West Palm Beach
Broward and Palm Beach Counties.
- SIXTEENTH Judicial Circuit J. Lancelot Lester, Key West
Monroe County.

ASSISTANT STATE ATTORNEYS

- FIRST Judicial Circuit Charles A. Wade, Crestview
Escambia, Okaloosa, Santa Rosa and Walton Counties.
- SECOND Judicial Circuit Harry Morrison, Wakulla
Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla
Counties.
- THIRD Judicial Circuit O. O. Edwards, Cross City
Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee
and Taylor Counties.
- FOURTH Judicial Circuit Nathan Schevitz, Jacksonville
Thomas J. Shave, Jr., Fernandina
Clay, Duval and Nassau Counties.
- FIFTH Judicial Circuit Z. D. Giles, Leesburg
Citrus, Hernando, Lake, Marion and Sumter Counties.
- SIXTH Judicial Circuit Sam Y. Allgood, Jr., New Port Richey
A. T. Cooper, Clearwater
Pasco and Pinellas Counties.

SEVENTH Judicial Circuit Julian C. Calhoun, Palatka
Flagler, Putnam, St. Johns and Volusia Counties.

EIGHTH Judicial Circuit Erle Leslie Griffis, Macclenny
Alachua, Baker, Bradford, Gilchrist, Levy and Union
Counties.

NINTH Judicial Circuit Thad H. Carlton, Ft. Pierce
Hubert E. Griggs, Cocoa
Brevard, Indian River, Martin, Okeechobee, Orange, Os-
ceola, St. Lucie and Seminole Counties.

TENTH Judicial Circuit L. Grady Burton, Wauchula
Hardee, Highlands and Polk Counties.

ELEVENTH Judicial Circuit Joe O. Eaton, Miami
Eugene A. Williams, Miami
Dade County.

TWELFTH Judicial Circuit E. M. Magaha, Fort Myers
Lynn N. Silvertooth, Sarasota
Charlotte, Collier, DeSoto, Glades, Hendry, Lee, Manatee
and Sarasota Counties.

THIRTEENTH Judicial Circuit J. Frank Umstot, Tampa
Hillsborough County.

FOURTEENTH Judicial Circuit Larry G. Smith, Panama City
Bay, Calhoun, Gulf, Holmes, Jackson and Washington
Counties.

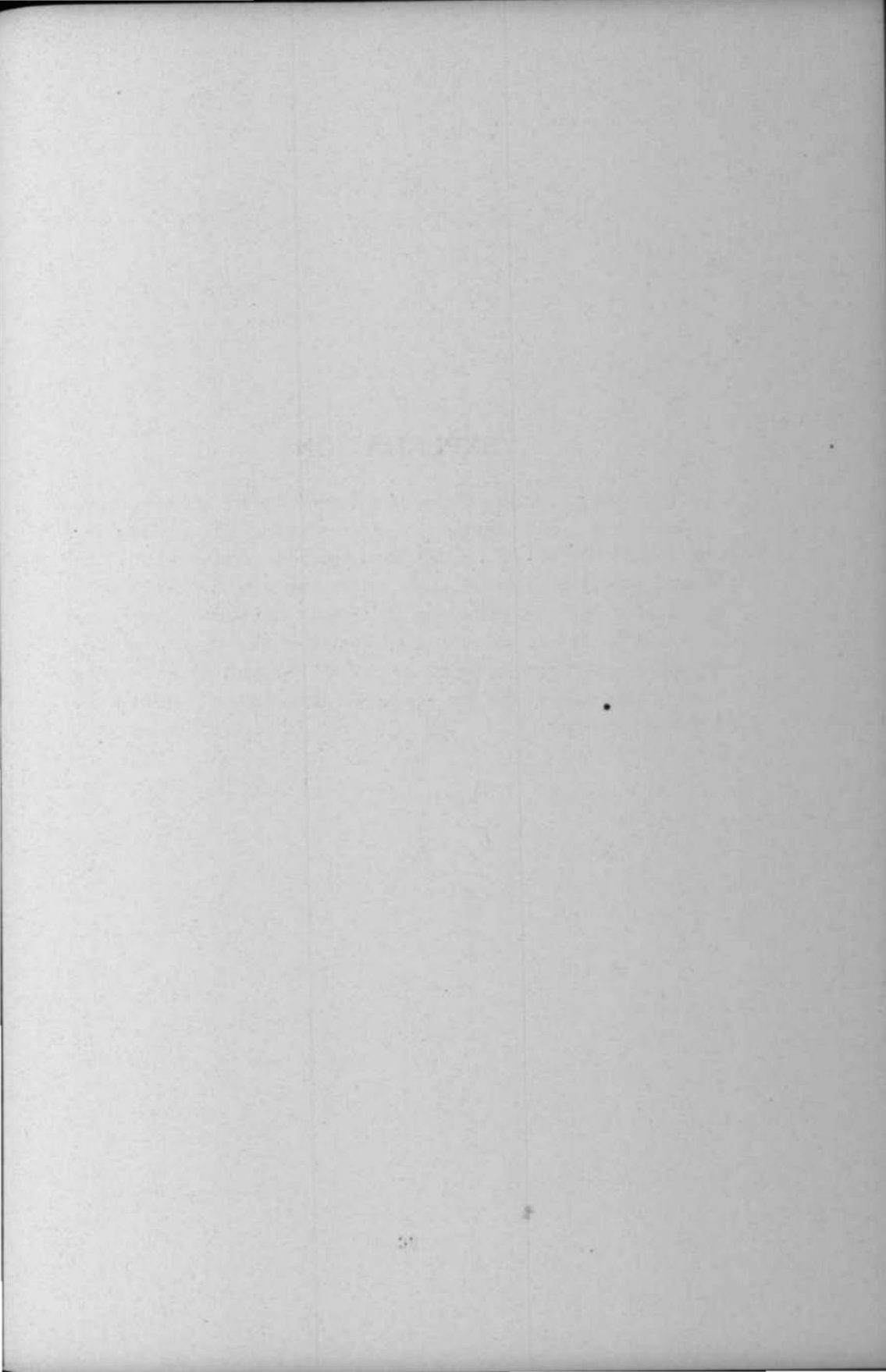
FIFTEENTH Judicial Circuit Frank S. Cannova, Hollywood
Broward and Palm Beach Counties.

SIXTEENTH Judicial Circuit (NONE)
Monroe County.

COUNTY JUDGES, 1949-1953

<i>County</i>	<i>Name</i>	<i>County Seat</i>
Alachua	H. H. McDonald	Gainesville
Baker	J. C. Lyons	Macclenny
Bay	Joseph W. Bailey	Panama City
Bradford	Theron A. Yawn	Starke
Brevard	Vassar B. Carlton	Titusville
Broward	Boyd H. Anderson	Ft. Lauderdale
Calhoun	Hannah B. Gaskin	Blountstown
Charlotte	John T. Rose, Jr.	Punta Gorda
Citrus	O. Frank Scofield	Inverness
Clay	Thomas J. Rivers	Green Cove Springs
Collier	S. S. Jolley	Everglades
Columbia	G. A. Buie, Jr.	Lake City
Dade	W. F. Blanton	Miami
Dade	Frank B. Dowling	Miami
DeSoto	Gordon Hayes	Arcadia
Dixie	Ike C. Harmon	Cross City
Duval	McKenney J. Davis	Jacksonville
Escambia	Harvey E. Page	Pensacola
Flagler	E. W. Johnson	Bunnell
Franklin	Raymond M. Witherspoon	Apalachicola
Gadsden	Frank B. Thrower	Quincy
Gilchrist	M. G. Akins	Trenton
Glades	J. M. Couse	Moore Haven
Gulf	J. E. Pridgeon	Wewahatchka
Hamilton	Ernest Rutledge	Jasper

Hardee	Lefferts L. Mabie, Jr.	Wauchula
Hendry	R. M. Harris	LaBelle
Hernando	Monroe W. Treiman	Brooksville
Highlands	Harry Lee	Sebring
Hillsborough	William C. Brooker	Tampa
Holmes	Klein McDonald	Bonifay
Indian River	Otis M. Cobb	Vero Beach
Jackson	Robert L. McCrary, Jr.	Marianna
Jefferson	Thomas B. Bird	Monticello
Lafayette	Guy M. McClain	Mayo
Lake	W. Troy Hall, Jr.	Tavares
Lee	Archie M. Odom	Fort Myers
Leon	Laurence Renfroe	Tallahassee
Levy	Wilbur F. Anderson	Bronson
Liberty	R. H. Deason	Bristol
Madison	Curtis D. Earp	Madison
Manatee	Geo. R. Hitchcock	Bradenton
Marion	D. R. Smith	Ocala
Martin	Arthur R. Clonts	Stuart
Monroe	Raymond R. Lord	Key West
Nassau	H. V. Burgess	Fernandina
Okaloosa	Wilbur F. Osburn	Crestview
Okeechobee	T. W. Conely, Jr.	Okeechobee
Orange	Victor Hutchins	Orlando
Osceola	O. P. Johnson	Kissimmee
Palm Beach	Richard P. Robbins	West Palm Beach
Pasco	A. J. Hayward, Jr.	Dade City
Pinellas	Jack F. White	Clearwater
Polk	Chester M. Wiggins	Bartow
Putnam	Causey S. Green	Palatka
St. Johns	Chas. C. Mathis, Jr.	St. Augustine
St. Lucie	Flem C. Dame	Ft. Pierce
Santa Rosa	Wm. A. Bonifay	Milton
Sarasota	John D. Justice	Sarasota
Seminole	O. Douglas Stenstrom	Sanford
Sumter	P. B. Howell	Bushnell
Suwannee	J. M. Hearn	Live Oak
Taylor	Byron Butler	Perry
Union	S. B. Brooks	Lake Butler
Volusia	Robt. H. Wingfield	DeLand
Wakulla	A. L. Porter	Crawfordville
Walton	Joe Dan Trotman	DeFuniak Springs
Washington	Willis Carl Trawick	Chipley



EXPLANATION

This report contains copies of a large majority of the opinions rendered by this office during the past two years. The opinions that are not included are of a purely local nature or application. It has been necessary to eliminate this surplus material in the interest of economy and book size since the number of opinions issued has increased beyond all expectations. Copies of any opinion omitted from this report are on file in this office. For omitted opinions by number and subject matter, see table immediately preceding the Alphabetical Index.

CHAPTER I
CONSTRUCTION OF STATUTES

NO OPINIONS

CHAPTER II
STATE ORGANIZATION

NO OPINIONS

CHAPTER III

LEGISLATIVE DEPARTMENT

HOUSE OF REPRESENTATIVES

November 15, 1951.—051-411.

EXPENSE FUNDS—PUBLIC CONTRIBUTIONS

QUESTIONS: 1. Can the Interim Committee of the House of Representatives (Haley Committee), created by House Resolution 49 of the 1951 Legislature, accept and use public contributions to pay its expenses in performing its authorized activities?

2. If the answer to question 1 is in the affirmative, in what manner and through what facilities can such funds be administered?

To: *Honorable William C. Cramer, State Representative, Pinellas County, St. Petersburg, Florida:*

The Interim Committee of the 1951 House of Representatives, known as the "Haley Committee," was established by House Resolution No. 49. Among the powers and duties assigned to such Committee were the following: to inquire into "all matters connected with or affecting the official conduct of any and all state or county officers and any and all state or county employees"; and to "make recommendations to local law enforcement officials, to state officials as to crime conditions and means of combating same"; and to make recommendations "to the Governor with reference to suspension of public officials for failure to properly enforce the criminal laws of this state." The Committee was also authorized, empowered and directed by the Resolution "to assemble such data by whatever means is deemed necessary such as . . . holding public hearings, employing investigators and legal counsel and taking any other proper and necessary action so as to properly and completely investigate and assemble data on crime and criminal activity in this state." The Committee was further directed to report the results of its activity to the 1953 Legislature "together with specific recommendations for future legislation."

In the absence of other available funds to defray the expenses of this Committee, you ask whether or not public contributions could be made to the Committee in order to pay the necessary and reasonable expenses incurred by the Committee in performing its duties.

Having made an examination of our Constitution and statutes, as well as the general field of law on this subject, I find nothing which would seem to prohibit such a Committee from accepting and using public contributions in the manner described in your letter, with the possible exception of the provisions of §838.06, F.S., as hereafter discussed. As a matter of general law, it appears settled

that legitimate donations of funds to public agencies are universally accepted as legally permissible, absent any improper or criminal motive, since a state or agency thereof has in general the right to acquire property, real or personal, by conveyance, will, gift or otherwise. See 49 Am. Jur. 269, 59 C.J. 164.

As indicated above, however, it possibly might be argued that \$838.06, F.S., presents an obstacle to the plan you propose. If payment of the necessary and reasonable expenses of the Committee is to be considered as a "reward, compensation or other remuneration" within the purview of this statute, the acceptance by the Committee of public contributions might be prohibited. Certainly, it would be contrary to this law for the members of the Committee to accept any such funds as salaries or compensation for their services, time or efforts.

However, there is a recognized distinction between the terms "reward," "compensation" and "remuneration," and reimbursement for actual and necessary expenses incurred by public officers in the performance of their official duties. A "reward" is a recompense or a premium offered in return for special or extraordinary services to be performed. "Compensation" is a payment for a service rendered, generally in the form of a salary or wage, *but does not include payments for "expenses."* Similarly, a "remuneration" is the equivalent of wages, salary, or compensation given to a hired person for his or her services. In other words, the payment or reimbursement for actual and necessary expenses does not fall within the category of a reward, compensation, or remuneration as generally understood and defined.

On the basis of the foregoing authorities, it seems that the acceptance of funds by this Committee to defray their necessary and reasonable expenses would not be within the purview of §838.06, F.S., and it is my opinion that this statute is not applicable to the instant problem.

There is little doubt that the members of the Committee could expend their own personal funds to defray the legitimate expenses of their travel, etc., and, for the reasons outlined above, it seems to follow that they would not be precluded from accepting public donations for the purpose of paying such expenses so long as such donations are voluntarily and freely given without restriction or limitation. In this connection, it is my opinion that it would be contrary to public policy and therefore improper for the Committee to accept a private contribution for the specific purpose of conducting a particular investigation or inquiry as directed by the donor thereof, but if bona fide private sources desire to contribute money to be used at the sole discretion of the Committee itself in defraying the necessary and reasonable expenses of such Committee, I find nothing in the law which would prohibit such action. Although it would appear to go without saying, it may be well to emphasize here that the Committee should give scrupulous attention to the sources of private contributions in order to make certain that it is not subject to any influence, or even to an appearance of influence, by any individual or group which may offer such contributions. This seems to answer your first question.

While not included in your questions, it may be helpful to offer one further suggestion: As a practical matter, I believe that if the individual members of the Committee could arrange to advance personally the funds to provide for their essential expenses, either from their own resources or by way of personal loan, there is a strong possibility that the next Legislature would make the necessary appropriation to fully repay such expenditures. This has been a customary practice, and I doubt that the precedent would be departed from in this particular instance. Accordingly, it may be that in lieu of accepting contributions, the Committee members may feel it best to advance or secure by personal loan the necessary funds, on the reasonable assumption that the Legislature will at its next session appropriate sufficient moneys to reimburse them for the expenses so incurred.

The second question, which involves the administrative handling of the moneys, when and if donated for the use of the Committee, there is no statutory procedure established which would have to be followed. Therefore, the method of depositing, disbursing and accounting for these potential funds would appear to be a matter for determination by the parties concerned rather than a subject for a legal opinion of this office. Other than to state that an accurate account of all such moneys received and expended should be kept by the Committee, open to public inspection, and reported to the next session of the Legislature, your suggestion that a special trust account be established under the control of the Committee itself would seem a reasonable and expeditious method of handling these expense funds to which I can see no objection. Your second question is answered accordingly.

May 30, 1951—051-143.

LEGISLATIVE COUNCIL—MEMBERS—SELECTION— MANNER, TIME

QUESTIONS: 1. May the President of the Senate, or the Speaker of the House of Representatives, remove or discharge a member of the Legislative Council, appointed from their branch of the Legislature pursuant to §11.21, and designate another in lieu of the discharged or removed member?

2. When may successor members of the Legislative Council be appointed and for what term should they be appointed?

To: *Honorable Wallace E. Sturgis, President of the Senate, CAPITOL:*

It seems clear from §11.21, F. S., that the Legislative Council is composed of members of the Senate and House of Representatives exercising additional duties placed upon them by reason of the said statute. They are not holding or exercising two state offices, but merely one office with additional duties placed upon them by the statute. The members of the Council, except the President of the Senate and Speaker of the House of Representatives, "serve at the pleasure of the Senate and House of Representatives, respectively." We construe this statute as providing that the members from the Senate serve at the pleasure of the Senate and the members of the House of Representatives serve at the pleasure

of said House. The service seems to be at the pleasure of the Senate or House of Representatives as a body and not at the pleasure of any member or group of members thereof less than the whole.

We find nothing in the statute indicating an intent on the part of the Legislature to authorize the termination of membership in the Legislative Council by any method other than by action of the body from which such members were appointed. There is no indication in the statute that the Legislature intended to delegate such power to any member or group of members of the respective houses of the Legislature less than the whole. The first question is, therefore, answered in the negative.

Under the Constitution of this State members of the House of Representatives are elected for terms of four years each. The terms of senators and representatives begin on the day of their election and expire on the day of the election of their successors in office. Where a term of office is not fixed by law, the officer holds at the will of the appointing power, and strictly speaking has no term of office (67 C.J.S. 196-7, §43). In the instant case the members, although appointed by the presiding officers of the two branches of the Legislature, serve during the pleasure of the Senate and House of Representatives, respectively. As the service on the Legislative Council is in the nature of the performance of additional duties by existing officers, it is evident that service on the council is limited by the member continuing to be a member of the Legislature. Should a member cease to be a member of the Legislature he would also cease to be a member of the Legislative Council. We, therefore, feel that appointment or selections to membership in the Legislative Council are for so long as the member continues to be a member of the State Legislature or until otherwise terminated by his branch of the Legislature by action of the body as a whole. Although a member's term in the Legislature expires if he is reelected he continues to be a member of the Legislature and of the Legislative Council.

In other words a member of the Council if reelected a senator or representative continues as a member of the Council at the pleasure of his branch of the Legislature. If he is not reelected, his vacancy is filled by remaining members of the Council. If a vacancy occurs prior to the general election by death or resignation, it may be filled as in the case of original appointment.

From the above and foregoing it appears that successor members of the Legislative Council may be appointed or selected only when a member ceases to be a member of the Legislature or when terminated by action of his branch of the Legislature acting as a body.

CHAPTER IV

EXECUTIVE DEPARTMENT

COMPTROLLER

March 14, 1951—051-54

STATE WARRANTS STOLEN—ENDORSEMENT—PAYMENT

QUESTION: Where the payee of a state warrant endorses it and receives cash therefor from the endorsee but which endorsee was robbed and the said state warrant taken illegally from him, but which warrant was later cashed by another without the consent of the endorsee and has now been presented to the state treasurer for payment should it be cashed over the protest of the said endorsee?

To: Honorable C. M. Gay, State Comptroller:

Although a thief or finder of a negotiable instrument can acquire no title as against the true owner thereof, it has been held that a holder in due course, both at common law and under the negotiable instruments act, takes good title even from a thief. More strictly, if the instrument is made payable to bearer, or is endorsed in blank, or is otherwise negotiable by delivery, an innocent purchaser for value and before maturity, who acquires it from a thief or finder acquires a good title and may recover thereon, and he may retain it even against the true owner. (10 C.J.S., 1117, §507). This raises the question of whether a state warrant is a negotiable or non-negotiable instrument.

In the absence of statutes providing otherwise state warrants are not negotiable instruments in the sense of the law merchant (59 C.J. 269, §407) and this same rule has been applied to municipal warrants (44 C.J. 1171, §4132; 64 C. J. S. 465, §1898; Town of Bithlo v. Bank of Commerce, 92 Fla. 975, 110 So. 837, text 838) and to county warrants (20 C. J. S. 1147, §250; Marshall v. Sartain, 88 Fla. 329, 102 So. 650, text 651). We, therefore, feel that the warrant in question is a non-negotiable instrument and not a negotiable instrument and does not come within the purview of our negotiable instruments law.

The instrument being non-negotiable in its nature it may not be transferred as if negotiable, but may be transferred by assignment which may be by endorsement and delivery, although there is no endorsement of such an instrument possible in the technical sense. They are assignable like other choses in action. Title to a non-negotiable instrument may pass by delivery under a blank endorsement. Whether the owner and holder of non-negotiable paper is negligent in handling such instrument endorsed in blank so that the same may be procured and assigned by others is a question of fact. (10 C. J. S. 438, §28). It is doubted that the person from whom the warrant was stolen was guilty of such negligence as to estop him from claiming title to the instrument. The circumstances in this case bear a similarity to the facts in the case of Scollans v.

Rollins, Mass., 53 N.E. 863, where the court held that the person from whom an endorsed non-negotiable instrument was stolen did not lose title by estoppel.

We, therefore, feel that the title of the warrant in question has not been divested from the holder thereof from whom stolen and that his actions concerning it were not sufficient to raise an estoppel. We do not think that the instrument should be paid, under the circumstances, without the consent of the person entitled thereto, which from the record appears to be the person from whom stolen.

March 5, 1952—052-66; 051-54.

COUNTY WARRANTS—STOLEN—ENDORSEMENT— DUPLICATES

QUESTION: Where the payee of a county warrant or check endorses it and receives cash or credit therefor from an endorsee but which endorsee was robbed and the said warrant taken illegally from him, may the county stop payment on such warrant and issue a duplicate therefor?

To: Honorable C. M. Gay, State Comptroller:

On March 14, 1951 (051-54) this office rendered an opinion to you covering a similar status of state warrants stolen under similar circumstances. An examination of the authorities reveals that like rules are applicable to county warrants (see 7 Am. Jur. 426, §589 et seq., and 920, §225; 8 Am. Jur. 332 and 333, §§619, 620; 43 Am. Jur. 403, §166). This being true there can be no bona fide holders of such warrants claiming through the thief.

In the light of these observations we see no reason why the Board of County Commissioners may not stop payment upon the said warrants and issue duplicate warrants and deliver them to the person from whom stolen. The county commissioners may also in their discretion require security from the person to whom such duplicate warrants are to be delivered should they feel protection is necessary.

May 5, 1952—052-146.

COMPTROLLER—STATE WARRANTS—CANCELLATION

QUESTION: Where a state warrant is cancelled, by the state comptroller, under §17.26, F.S., what method should the comptroller follow in handling his accounts in connection with such cancellation?

To: Honorable C. M. Gay, State Comptroller:

Section 17.26, F.S., (which was derived from Ch. 22006, Laws of Florida, Acts of 1943), insofar as here material, provides that "if any state warrant issued . . . against any fund in the state treasury, is not presented for payment within six months after issuance thereof, the comptroller may cancel the same and credit the amount of such warrant to the fund upon which it was drawn . . . When the payee or person entitled to any warrant so cancelled . . . requests payment thereof, the comptroller may, upon investigation, issue a new warrant therefor, to be paid out of the proper fund in the state treasury . . ." Where the cancelled warrant was

charged against an expired appropriation or an account no longer operative the new warrant is payable from the general revenue fund. Only when a cancelled warrant was drawn against a fund other than the general revenue fund and such fund has expired or is no longer operative may such reissued warrant be paid from the general revenue fund.

Sections 215.30 et seq., F. S., (which was derived from Ch. 22833, Laws of Florida, Acts of 1945), created and established, in lieu of all other funds theretofore created or established, five funds, to wit: General Revenue Fund, State Agencies' Fund, General Inspection Fund, State Road Fund, and a Trust Fund, in which all state moneys are required to be classified and deposited. The source of these five funds, and a general description of them, is found in §215.32, F. S. Under §215.35, F. S., warrants issued against any of the said five funds "shall be coded to show the fund, account, purpose and department involved in the issuance of such warrant." This section of the statutes seems to provide for funds and accounts (evidently within such funds). Reference in the 1943 act to the payment of the reissued warrant "*out of the proper fund in the state treasury*," which reference has been carried into both the 1949 and 1951 Florida Statutes without change, should be read in the light of the 1945 five funds acts which have also been brought forward into the said statutes. If the reference in the 1943 enactment was intended to refer to an account within a fund, as is clearly contemplated by the 1945 five fund act, then the legislatures of 1947, 1949 and 1951, in revising and readopting the statutes, should have revised the provisions and made uniform the meaning of the terms. I think that we should presume that the subsequent legislatures in using the term "fund" in the revisions of §17.26 and in the revision of the five funds law intended to give them the same general meaning.

Under §4, Art. IX, of the state constitution, "no money shall be drawn from the Treasury except in pursuance of appropriations made by law." The state constitution, as well as the statutes, contemplates that each state officer, department, board and agency be governed and controlled, in their expenditure of public funds, to their appropriations. There was no intent or purpose, by the adoption of said §17.26, F. S., of permitting any such officer, department, board or agency, within any appropriation period, to expend anything in excess of his or its appropriation. §17.26, F. S., clearly contemplates that reissued warrants be paid, whenever possible, from the funds provided for the payment of the original; there was no legislative intent of devising a scheme for state officers, departments, boards or agencies avoiding the proper payment of the obligation from current appropriations. We, therefore, feel that the state comptroller should devise a method of accounting, with relation to warrants cancelled under said §17.26 and warrants reissued thereunder, as will preserve the intention and purpose of the constitution and statutes relating to appropriations. Section 17.26 should be read and construed in conjunction with other applicable constitutional and statutory provisions.

We, therefore, feel that the state comptroller, in connection with the cancellation of the state warrants under §17.26, F. S., should so keep his accounts as to prevent any abuse of the appropriation statutes and to preserve funds for the payment of the

amount represented by the cancelled warrant in case it should be reissued, at least for a reasonable length of time and probably, in most cases, to the end of the appropriation period. We see no objection to his maintaining a separate account within a fund for this purpose, so long as the said account will not represent more than one of the five funds established by the statutes. Where such a separate account is maintained the credit to such account of the amount of a cancelled warrant would seem to meet the requirement that the amount of the cancelled warrant be credited to the fund upon which it was drawn; provided, however, that such account is so coded as to identify the accounts in the fund from which the warrant was originally drawn. This method of handling the accounts will protect the appropriation against an overdraft and will at the same time insure the payment of the reissued warrant. Warrants cancelled for reasons other than that mentioned in said \$17.26 should not be considered as within the purview of this opinion.

STATE AUDITING DEPARTMENT

August 22, 1951—051-284

STATE AUDITOR—COUNTY ACCOUNTS—GOVERNMENTAL PROPRIETARY FUNCTIONS

QUESTION: Is there any difference, in the primary duty of the state auditor, in auditing the accounts of county officers when they relate to governmental functions and when they relate to the proprietary functions of the county?

To: Honorable Bryan Willis, State Auditor:

Under the requirements of the statutes of this State the state auditor and his assistants are required to "correctly audit, once each year, all state and county officers, state institutions and state boards, and departments." (§21.05, F. S.). The business of the counties, as well as of the state and its institutions, boards and departments, has so increased in recent years that the state auditor, with his present appropriation, equipment and personnel, cannot comply with the letter of the said statutory requirement. It is physically impossible for the state auditor and his assistants to even audit the governmental accounts "once each year" and comply with the statutes; in fact the rotation of audits is now considerably less than once each year. If the state auditor is required to make a complete audit of the proprietary accounts of county officials, as he is doubtless required to make of the governmental accounts, the rotation of audits will be of much longer rotation; probably not once every two years, or maybe once every three years.

Many of the counties of this State in addition to the prosecution of their governmental functions and duties, also engage in proprietary functions and businesses; such as the operation of airports, hospitals, parks, toll bridges, recreation facilities, and other businesses. In the earlier days of this State county functions were almost entirely governmental; however, in more recent times county functions have been extended so that many of the functions performed by a modern county are proprietary in their nature. There appears to be a broad distinction drawn by the courts between the

governmental functions of counties, municipalities and other governmental agencies. Often the liability of a county or municipality for tort depends upon whether it arose from a governmental or proprietary function (20 C. J. S. 1067 and 1075, §§215 and 220; 63 C. J. S. 29, §746; *Barth v. City of Miami*, 146 Fla. 542, 1 So. 2d 574, text 577). A distinction is usually made between the public or governmental function of a municipality or other governmental agency, on the one hand, and its proprietary functions on the other (63 C. J. S. 29, §746; *Elrod v. City of Daytona Beach*, 132 Fla. 24, 180 So. 378, text 380). "The governmental functions and the corporate duties and authority (proprietary functions) of a municipality may be regarded as being distinct" (*Barth v. City of Miami*, 146 Fla. 542, 1 So. 2d. 574, text 577). Doubtless the same distinction may be drawn between the governmental and the proprietary functions of a county. When a county acts in its governmental functions it exercises its attributes of sovereignty and acts for the benefit of the public generally; when it acts in its proprietary functions it acts in a private or semi-private capacity and exercises powers and functions conferred upon it for its own benefit and for the benefit of its inhabitants incidently.

The proprietary functions of a county are usually carried on by the county in the nature of a business function operated under the direction of the board of county commissioners or some other county officer or by an independent commission or agency provided for by law. This officer or agency of the county is charged with the operation of the business and the carrying on of its functions in much the manner as a private business is carried on. Private businesses have periodic audits of their books and records. We feel that the auditing of such business is a primary duty of the operating agency of the county, and if a duty of the state auditor it is in the nature of a secondary duty of his.

We feel that it was the primary intention of the Legislature, when it set up the State Auditing Department, to provide for the protection of public funds and for the protection of the public generally. Where the state auditor, by reason of the want of funds or of personnel, is unable to audit all governmental and proprietary books and records of a county, he should give preference to the governmental records and books. If he is able to audit but one class of such records and books he should give preference to the governmental records and books. We, therefore, feel that the state auditor should make it his primary duty to audit the books and records of a county relating to its governmental functions, and his secondary duty to audit its books and records relating to its proprietary functions.

When a county has caused the books and records relating to its proprietary functions to be audited, the state auditor, especially when he is unable to audit both classes of books and records of the county, might examine the audit and accept it, *prima facie*, unless there be something about the said audit or otherwise, raising a question in his mind suggesting the necessity of a state audit. In such a case if the auditor feels that a state audit of the proprietary books and records is necessary for the protection of the people of the county he should use his discretion and even make an audit of

the same even giving it preference over an audit of the governmental books and records of the county. In all such matters, where the state auditor is unable to make audit of both governmental and proprietary books and records, he must use his discretion, however giving preference to the governmental books and records when everything is equal. This seems to answer the above question as well as it may be answered.

CHAPTER V

JUDICIARY DEPARTMENT

CIRCUIT COURTS, CIRCUITS, JUDGES, ETC.

December 13, 1951—051-453.

CIRCUIT JUDGES—STATE SALARY INCREASES— SUPPLEMENTARY PAYMENTS

QUESTION: What effect does Ch. 26818, Laws of 1951 (§26.51, F. S.), which raises the state salaries of the circuit judges to \$10,000 per annum, have upon Ch. 22631, Laws of 1945, Ch. 24004, Laws of 1947, and Ch. 24246, Laws of 1947, which are acts providing for supplementary payments by the county of Dade to the circuit judges of the Eleventh Circuit?

To: Honorable C. M. Gay, State Comptroller:

Chapter 22631, Laws of 1945, is a local act applicable to Dade county which provides for additional compensation to be paid by Dade county to the circuit judges of that circuit, over and above the salary to be paid by the state. Specifically, it provides that each circuit judge affected thereby shall "in addition to such compensation as he may be entitled to receive from the state treasurer . . . be entitled to also receive from and be paid by such county out of its general revenue, a sum sufficient to make his total compensation the sum of eighty-five hundred (\$8,500) dollars per annum . . ."

Chapter 24004, Laws of 1947, also applicable to Dade county, provides that each circuit judge in that county shall be paid from county funds "further additional supplementary compensation in the sum of two thousand five hundred (\$2,500) dollars." In this law, there are provisos which state that this additional compensation "shall be cumulative and in addition to all other sums provided by any other law or laws" and that "nothing herein contained shall in any wise be considered in calculating the total emoluments of the office of such circuit judge provided by any other law or laws."

The third act applicable to Dade county is Ch. 24246, Laws of 1947, which provides for the circuit judges of Dade county "additional supplementary compensation equal to twenty (20%) percentum of such annual compensation paid him by the state" and specifically says that "nothing herein contained shall in any wise be given consideration in calculating the emoluments of office provided by any other law."

Accordingly, prior to the enactment of Ch. 26818, Laws of 1951, the circuit judges of the Eleventh Judicial Circuit were receiving a state salary of \$7,500 per annum under the general law, which state salary was supplemented by the county in varying amounts under the three acts cited above, namely: an additional \$1,000 by virtue of the "up to" provisions of Ch. 22631, Laws of 1945; with

the flat sum of \$2,500 according to Ch. 24004, Laws of 1947; and a further sum equal to 20 per cent of the state salary as authorized by Ch. 24246, Laws of 1947. By virtue of the provisos written into these acts, each of these supplemental laws were made cumulative and independent of each other so that all three were in full force and effect at the time of the passage of Ch. 26818, Laws of 1951, which raised the state salary to \$10,000.

The question now presented, then, is what effect this 1951 general salary act has upon the three county supplement acts described above.

As to the 1947 acts, i.e., supplementation in a specific amount and supplementation by a certain percentage, there seems little doubt that such acts remain in full force and effect and are in no way repealed or suspended by the new law. The 1951 general law refers specifically to the salaries "to be paid by the state" which is a clear recognition of the existence of other salaries which are paid by the county, and hence does not involve such supplements. Furthermore, there is no repealing clause in the general law nor do its provisions conflict in any way with the supplemental salary acts. And, finally, as mentioned above, each of the supplementation acts themselves clearly provide that such supplemental payments shall be "in addition to" such other laws. Accordingly, it seems clear that the act providing for supplementation in a specific amount (Ch. 24004, Laws of 1947) and the act providing for a percentage supplement (Ch. 24246, Laws of 1947) remain in full force and effect, except that the percentage supplementation authorized by the latter act would henceforth be figured on the current state salary.

However, as to the 1945 supplementation act, i.e., supplementation "up to" a certain amount, a more difficult question is presented. Upon first examination, it seems that since the state salary, now fixed at \$10,000, is in excess of the "up to" amount (\$8,500) specified by Ch. 22631, Laws of 1945, there would no longer be any room in which such act could operate, and that this act would simply be suspended until such time as the state salary might again fall below \$8,500.

However, Ch. 26818, Laws of 1951, contains the following proviso which was added by way of amendment in the House during the bill's passage through the Legislature:

"Provided, however, that nothing contained herein shall be so construed as to reduce the salary of any circuit judge in any circuit of the State of Florida where the salaries of said judges are supplemented by the counties of said circuit."

It is a cardinal rule of statutory construction that each part of a law must, if at all possible, be given meaning and effect. 50 Am. Jur. 361-365; *Axtell v. Smedley & Rodgers Hardware Co.*, 52 So. 710. This principle is equally applicable to provisos in a law. *Therrell vs. Smith* (Fla.), 168 So. 389. The necessity of giving meaning to the language of a proviso is emphasized when it appears that it is an amendment placed upon the act in one house of the Legislature after it has been passed in the other. See *State vs. Amos* (Fla.), 79 So. 433.

What, then, was intended by the Legislature when it added this proviso to the subject bill? The proviso, in essence, in an expression of legislative intent that nothing contained in the act is to be construed as to have the effect of reducing the salary of any circuit judge in those counties where supplements are paid to such judges over and above the state salary. It is obvious that the proviso applies only to a possible reduction of county supplementary payments, since the legislature could not have been referring to a reduction of the salary paid by the state, inasmuch as the prime function and obvious result of the act was to increase state salaries. Therefore, having ascertained that the only purpose of the proviso was to prohibit the reduction of county supplementary payments, let us examine what the effect of the law might have been on such county supplements if the subject proviso had not been added.

Since, as heretofore discussed, the 1951 general law clearly applies only to the salaries "to be paid by the state" and does not pertain to the county supplements, no proviso was needed to preserve such supplementation acts as Chs. 24004 and 24246. The payments made under such laws are not state salaries but county salaries, and these acts themselves contain provisos, as already noted, which make them clearly "cumulative" and "in addition to any other law or laws." Accordingly, it follows that the 1951 law as originally passed in the Senate without the proviso would have no effect on these types of county supplement laws. Therefore the subject proviso could only be considered as surplusage as far as these two acts or others of a similar nature are concerned.

But turning now to Ch. 22631, Laws of 1945, it seems clear that without the subject proviso, the 1951 general law would have suspended supplementation authorized by that chapter, inasmuch as the state salary was increased to an amount higher than \$8,500; therefore such act could have no further application in the absence of a legislative indication to the contrary. In summary, then, the only possible effect that the 1951 law could have had on any supplementation act would be to suspend the operation of such laws as Ch. 22631, Laws of 1945, where the "up to" amount is less than \$10,000.

Thus, it seems to follow that in order to give any logical effect or meaning whatsoever to the subject proviso, it must be construed to have been included by way of amendment for the sole purpose of continuing in effect the supplementary payments made under that type of supplementation act represented by Ch. 22631. Unless the proviso is interpreted in this manner, it will have no effect whatsoever and must be disregarded as surplusage and without meaning. And it is a basic legal premise that only where a proviso or other part of a statute can be given no sensible effect will the rules of statutory construction allow it to be so disregarded and ignored. See 50 Am. Jur. 364, 365, and *Therrell vs. Smith*, supra.

Therefore, in order to give the subject proviso a logical and sensible interpretation, and, in fact, to give it any effect whatsoever, it is necessary to conclude that the Legislature added such proviso to the law in order to assure that all supplementations being paid by a county at the time the 1951 law became effective should continue to be paid by the county, regardless of the formula or

language of the supplementation act by which such additional compensation was provided. In other words, the only meaning that the proviso could have is that it carries forward and provides for the continued payment of county supplementation in a sum not less than that actually paid by the several counties before the passage of the 1951 law.

This construction also seems to be consistent with the obvious purpose of Ch. 26818, Laws of 1951, which was to increase state salaries of the circuit judges throughout the state without affecting the county supplementations. If the act were construed so as to suspend certain types of county supplementations, the law would fail to confer a uniform benefit on all judges, and in some counties would result in no benefit at all where acts similar to Ch. 22631 already provided for county supplementation "up to" \$10,000 or more. Consequently, by interpreting the act so as to preserve intact all types of county supplementations, regardless of the formula or language of such laws, each and every circuit judge will receive the intended uniform benefits of the 1951 salary act.

Accordingly, it is my opinion that Ch. 26818, Laws of 1951, has the effect of fixing the amount of supplementation paid under Ch. 22631, Laws of 1945, at the amount being paid thereunder prior to the enactment of the 1951 law and that Ch. 22631, Laws of 1945, Chs. 22004 and 24246, Laws of 1947, remain in full force and effect in Dade county.

STATE ATTORNEY; POWERS, DUTIES, ETC.

May 16, 1951—051-120.

JUDICIAL CIRCUIT—ASSISTANT STATE ATTORNEY— EMPLOYMENT

QUESTION: Is it proper and ethical for an assistant state attorney of one judicial circuit to accept employment to go into another judicial circuit and there defend a person charged with a misdemeanor in the County Court?

To: *Honorable Fred T. Saussy, Jr., Assistant State Attorney,
Hillsborough County, Tampa, Florida:*

In the case of *In Re Wakefield*, 177 A. 319, the Supreme Court of Vermont aptly said:

"It is a matter of common knowledge, of which we take judicial notice, that it has been the practice of some state's attorneys to appear in another county in the state and defend a respondent charged with committing a crime in such other county, or to appear in proceedings in which the state was an opposing party or had adverse interests. Such practice is unethical and improper and it should not be followed or countenanced. A state's attorney in this state is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the state, in the general matter of the enforcement of the criminal law. It is the state, and not the county, that pays his salary and official expenses."

* * *

"There is an opinion by the American Bar Association Committee on Professional Conduct in the February, 1935,

Issue of the American Bar Association Journal, p. 116, which is pertinent to the principles involved in this case.

"The committee was asked if a county attorney whose duty it is to prosecute crimes committed within the county, but who is permitted by statute to practice law while in office, may properly undertake to obtain a pardon or parole of one convicted in another county, in whose conviction he took no part, and he had no previous knowledge of the facts of the case. The opinion of the committee, holding that such employment would be professionally improper, and which we fully approve, is as follows: 'A county attorney is attorney for the state in the general matter of the enforcement of the criminal law, although the sphere of his activity is limited to a particular county. It would be manifestly improper for him to represent one whose conviction he had brought about to obtain a pardon or parole. In so doing he would be nullifying, in the hope of personal gain, the results of the performance of his duty as attorney for the State. It is not different in principle when he seeks to nullify the results of the performance of duty by another for the State with reference to the same general subject matter. The statutory permission to practice law while in office must have been intended to be limited to matters in which the State is not a party. *For one county attorney to engage in undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public confidence in and respect for law enforcement.* The application for a pardon or parole appears to be a proceeding in which the State is interested adversely to the convict. The convict's representation should be left to those who are not attorneys for the State'."

I agree with said pronouncements and I think that the principles therein laid down are in all respects applicable to assistant state attorneys. Therefore, it is my opinion that your question is properly answered in the negative. The fact that the employment offered the assistant state attorney is for the representation of a defendant in a county court, instead of in a circuit court, does not, as I see it, make it any the less improper for the assistant state attorney to accept such employment.

CLERK OF THE CIRCUIT COURT

January 10, 1952—052-6.

CLERKS CIRCUIT COURTS—COMPENSATION—POSTAGE—REIMBURSEMENT

QUESTION: May the clerk of the circuit court of Highlands County make a charge for postage in addition to the flat filing fee required to be paid him under Ch. 21649, Laws of 1943?

To: Honorable H. I. Piety, Clerk of Circuit Court, Highlands County, Sebring, Florida:

Chapter 21649, Laws of 1943, provides in pertinent part as follows:

"Section 1. Upon the institution of any civil action, suit or proceeding in law or in equity in the Circuit Court of Highlands County, State of Florida, there shall be paid by the party or parties so instituting such action, suit or proceeding as fees of the Clerk of said court, for all services to be performed by him therein, *in lieu of all other fees heretofore charged*, the sum of \$10.00 . . ." (Emphasis supplied)

Noting the emphasized portion of this law it becomes necessary to determine what fees were heretofore charged. Section 28.24, Florida Statutes, contains an enumeration of fees authorized to be charged by the clerks of circuit courts for services to be performed by them. This statute is of general application and the fees recited were those apparently authorized to be charged by the clerk in Highlands County prior to the enactment of Ch. 21649, Laws of 1943. It is to be observed that the enumeration contained in that law makes no reference to postage. It seems to follow then that postage is not to be considered as one of those fees "*heretofore charged*," within the meaning of the underlined language contained in Ch. 21649, Laws of 1943, as set forth above.

It is also to be recognized that the filing fee, according to Ch. 21649, is to be paid the clerk for all "services" to be performed by him. Postage, as such, does not, in my opinion necessarily fall within the category of "services" as it is not actually a service, but is more correctly a payment or expenditure made by the clerk and he therefore reasonably could expect to be reimbursed for such added expenditure, over and above his statutory compensation for services performed.

It is my opinion that postage may be charged in addition to the flat filing fee, and accordingly the question is answered in the affirmative. However, I understand that in one or two circuits the practice which has prevailed is to pay nominal postage, but to charge an additional sum in those cases where the postage is more than nominal. As a practical matter, it is suggested that in those cases wherein the average postage would be ten cents or less, the clerk might well pay it from the flat filing fee, in order to avoid burdensome bookkeeping problems which otherwise might result in attempting to determine and charge postage in all cases.

January 24, 1952—052-17.

CLERKS CIRCUIT COURTS—COMPENSATION —ADDITIONAL FEES

QUESTION: Do the fees provided to be paid the Clerks of the Circuit Courts by §4 of Ch. 26931, Laws of 1951, (§28.241, F. S.) include compensation for the following services: (1) issuance of subpoena, (2) issuance of jury venire, and (3) clerk's per diem?

To: Honorable G. M. Simmons, Clerk Circuit Court, Titusville, Fla.:

From a perusal of §4, Ch. 26931, Laws of 1951 (§28.241, F. S.) it appears that the flat fee provided therein was intended to include compensation for services derived from fees charged to a defendant prior to its enactment.

Section 28.24, F. S., provides for compensation of Clerks of Circuit Courts and enumerates those fees to be charged for par-

ticular services. This statute is of general application and it is apparent that the fees set forth therein were those authorized to be charged prior to the enactment of the above quoted act. This statute however includes two classes of fees. The first class are those charges which are directly connected with a particular case, all of which were charged to the defendant when he became liable for costs. The second class of fees enumerated are compensation for services which were not charged to the defendant, but were billed separately to the county, inasmuch as they could not be charged to any given case. This latter class includes general charges such as issuance of jury venire, clerk's per diem, and issuance of subpoena not directly connected with a particular case.

It seems therefore that issuance of jury venire, clerk's per diem, and issuance of subpoena not directly connected with a given case were not charges "heretofore" made to the defendant and thus are not included in the flat fee.

The question is accordingly answered in the negative with the qualification that fees for the issuance of subpoena issued in direct connection with a particular case are included in the flat fee provided.

September 12, 1951—051-312.

CLERKS OF COURTS—COMPENSATION INCREASE

QUESTION: Does the proviso contained in §3 of Ch. 26931, Laws of 1951, relating to compensation of the clerk of courts, have application also to §§1 and 2 of that law?

To: *Honorable Bryan Willis, State Auditor:*

Chapter 26931, Laws of 1951, is an act relating to the compensation of clerks of courts for services performed in suits or proceedings in courts in the State of Florida. Generally, the act sets up a uniform flat filing fee system for the county courts and circuit courts of the state where such fees have not otherwise been provided by other special acts. Sections 1 and 2 of the act refer specifically to fees to be collected by the clerks of county courts, while §3 refers specifically to fees to be paid to the clerks of the circuit courts upon the institution of civil actions, suits or proceedings.

Your question, as indicated above, is whether or not the proviso relative to the additional fee in any action where there are more than five defendants, applies only to the fees to be collected by the clerks of circuit courts, or whether the proviso is also applicable to §§1 and 2 of the act relating to fees to be paid to the county court clerks, which sections have no similar provision contained in the text thereof.

Admittedly, the proviso here in question occurs only within §3 of the act, and at first reading appears to refer only to the subject matter of this section, which relates to fees of the circuit court clerks. However, while the old rule of statutory construction was that a proviso attached to a particular section of a statute was limited to this section, this rule is seldom followed today. As stated in Horack's Sutherland Statutory Construction, 3rd Edition, §4932,

courts have adopted the rule that a proviso will be applied according to the general legislative intent and will limit a single section or the entire act, depending on what the legislature intended. Quoting from §4934 of Sutherland Statutory Construction, "Although originally the proviso was said to restrict only the section to which it was attached, the modern rule applies the proviso to all sections of the act, if it can be determined that that was the legislative intention. Although the form and the location of the proviso may be some indication of the legislative intent, form alone will not control. No presumption should arise from the mere location of the proviso that it is applicable only to the section in which it appears"

Applying this rule to the instant case, it seems that the only guide in determining the question here involved is to ascertain the legislative intention. Obviously, it was the intention of the legislature to increase fees to be paid the clerks the sum of 25 cents for each defendant above the number of five, in view of the additional paper work, etc., involved in a suit or action with a large number of parties. Since I can think of no reason why this additional compensation should be permitted to clerks of the circuit courts only, and not to the clerks of the county courts, it seems to me that the most reasonable interpretation would be to conclude that the legislature intended the same rule to apply to all clerks, whether they be clerks of the county courts or of the circuit courts.

In the absence of a positive indication that the proviso was meant to apply only to fees to be paid to the clerks of the circuit courts, and based on the above modern rule of statutory construction, it is my opinion that the proviso contained in §3 applies with equal force to §§1 and 2 of Ch. 26931, Laws of 1951, and that your question should be answered in the affirmative.

April 6, 1951—051-84.

CLERK OF CIRCUIT COURT—JUDGMENT LIEN RECORD
—FEES

QUESTIONS: 1. Are judgments rendered by the Circuit Court and entered in the Minute Book kept by the Clerk to be entered by the Clerk as a matter of course in the Judgment Lien Record without specific request by the judgment creditor or his attorney?

2. Is the recording date of a judgment entered in the Judgment Lien Record the date the judgment was rendered, or the date it was actually entered in the record?

3. Under Ch. 25001, Laws of 1949, what fee should be charged for the recording of such judgments in the Judgment Lien Record?

To: *Honorable A. W. Nichols, Clerk of the Circuit Court, Putnam County, Palatka, Florida:*

The answer to your first question may be found in the provisions of §28.21 (11), F. S., which establishes one of the records to be kept by the clerk.

You will note that this section provides that the judgment lien record is to have entered into it all certified transcripts of

judgments and decrees of the various courts of this state and of the United States district courts in this state "*which may be presented for such record.*" It is my opinion that this contemplates that the judgment creditor or his attorneys are expected to present such judgments to the clerk for recording and that it is the responsibility of such judgment creditors or their attorneys to ascertain that the judgments are recorded, rather than that of the clerk. This concurs with an opinion rendered by my immediate predecessor in office, wherein, in response to a similar question, he stated, "It is my opinion that the judgment creditor or his attorney has control of the said decree or judgment and it is his privilege to present to you a certified copy of such decree or judgment. It is not your duty to see that the same is done." (1945-46 Biennial Report, page 155)

Your first question then, as phrased above, is answered in the negative.

As to your second question, this may be answered by reference to the last sentence of §28.21 (11) quoted above, which states, "The date, hour and minute of recording shall be noted at the bottom of such record." Accordingly, it seems clear that the date specified by the statute is that of the actual recording in the judgment lien record, and not the date when rendered by the court or entered in the minute book.

Your third question has to do with the fees to be charged for the services described above, under the provisions of Ch. 25001, Acts of 1949, which prescribes a flat fee system for certain Circuit Court Clerk's offices in this state. This law, where applicable, provides as follows: "The clerk of the circuit court . . . shall, for all services performed by such clerk in any action, suit or proceeding before such court, in lieu of all other fees fixed by law, receive a flat fee as hereinafter set forth . . ." Essentially, then, the answer to this question depends upon whether or not the preparation of a certified copy of the judgment, and its recording in the judgment lien record, is part of the "action, suit, or proceeding before such court" within the purview of this statute.

When the judgment of a circuit or other court in this state is rendered it is entered in the minute book of said court (or in the chancery order book if in equity), and when so entered execution or other proper process for its enforcement may issue thereon, although under §55.10, F. S., such judgment does not become a lien against the real property of the defendant until a certified transcript thereof is recorded in the judgment lien record. In my opinion, the recording of the certified transcript of the judgment is not a step in the judicial proceedings but merely declares the lien of the judgment or execution. Judgments may be enforced by the process of the court although they are not entered in the said judgment lien record. Therefore, I do not believe that the procuring of a certified copy of the judgment and the recording of the same in the judgment lien record is a part of the judicial proceeding in which the judgment was entered. Hence, it would appear proper to charge the regular fees payable for certified copies and for recording for such additional services. This seems to answer the third question.

May 27, 1952—052-164.

**CIRCUIT COURT—CLERK'S FEE—REGISTRY
—MONEY PAID INTO**

QUESTIONS: "1. Is any fee, or part of a fee, earned when the money is received into the registry of the court? The answer to this question is necessary when the money is received by one clerk and paid out by a successor in office.

"2. Should the fee be paid, or a deposit taken calculated on the amount paid in, when the money is received, or should the fee be collected, or deducted from the money, when the money is paid out?

"3. Is the fee payable by the party who pays it into the registry, or by the party to whom it is awarded, or by the party who loses the suit?

"4. When more money is paid into the registry than is awarded to an adverse party, and the residue is returned to the depositor, pursuant to or without an order of the court, is the clerk entitled to his fee on the money so returned?"

To: Honorable Bryan Willis, State Auditor:

Question One

Funds in the registry of the Court may, by reason of litigation or otherwise, remain for considerable time. In such a situation it may be deposited with one clerk and paid out by another. One of my predecessors in office over twenty years ago ruled that the fee is earned and is to be collected when the money is paid out of the registry (1931 A.G.O. 490). The Clerk's Manual at page 323 makes the same statement. I concur with these interpretations.

Questions Two and Three

These questions are combined for they are closely related. Where a deposit is made into the registry of the Court, pursuant to the mandate of a statute, for example, in condemnation proceedings, I do not believe the person whose property is being taken, should be required to pay the Clerk's fee. The law contemplates that the defendant shall receive the entire award, free from any fees or expenses (§§73.16 and 74.10, F.S.). Should the deposit be made as a matter of convenience, or by way of tender to an opposing party in a litigation, it seems to me the Clerk's fee should, as is usual with costs, be assessed against the losing party.

Question Four

The litigant should not be required to pay a percentage or fee on monies not required to be paid out of the registry by an appropriate judgment, decree or other order of Court. To charge a fee on excess funds, would be penalizing a party who, in good faith, deposited money into the registry.

June 14, 1951—051-160.

CLERK CIRCUIT COURTS—DUAL JOBS—COMPENSATION

QUESTION: Is a clerk of the circuit court, when acting as clerk of the board of county commissioners, entitled to special or

additional compensation for his work in making a distribution of tax funds to municipalities, said funds having been collected under the provisions of §343.17, F.S.?

To: Hon. Loran L. Cook, Clerk Circuit Court, Washington County:

Section 343.17, F.S., requires the county to make the refund provided to the municipalities. You will note that it makes no provision for special compensation to the clerk of the county board of commissioners for performing this duty.

The Attorney General in 1929 (1929-30 Biennial Report, pages 388-9) held that under §28.25, "The board of county commissioners has the option of either paying the clerk a reasonable salary proportionate to the amount of fees he would receive if he were paid on a strictly fee basis, or they have the option of paying him upon a fee basis entirely."

The fees referred to are based upon fees allowed by statute for other and similar services (1946-7 Biennial Report, page 27). Provision for such payments must be included in the budget adopted under Ch. 129, F. S.

If the clerk is paid a definite salary as compensation for acting as clerk of the board of county commissioners under §28.25, it appears that such compensation would include the work of making the distribution of tax funds in question. If the clerk is paid on a fee basis, then the making of the distribution should be paid for on that basis.

It would appear that the responsibility placed on the clerk to make the distribution in question is a regular duty from year to year and should be taken into consideration by the board of county commissioners in fixing the compensation of its clerk. As pointed out above, the method of compensating the clerk, whether by fees or a fixed salary, is left to the discretion of the board of county commissioners.

Subject to the above remarks and explanation, your question is therefore answered in the negative.

September 4, 1951—051-296.

CLERKS CIRCUIT COURTS—BRANCH OFFICES—RECORDS

QUESTIONS: 1. Where there exists a branch office of the clerk of the Circuit Court in a place other than the county seat, may the clerk receive, file and issue process on common law, equity and statutory proceedings at such branch office?

2. May process issued by the Clerk of the Circuit Court be delivered to the sheriff at a branch office of such clerk located in a place other than the county seat?

To: Honorable Ted Cabot, Clerk Circuit Court, Ft. Lauderdale, Florida:

Under §4, Art. XVI of the State Constitution, it is required that "all county officers shall hold their respective offices and keep their official books and records at the county seat of their counties

...” This provision of the State Constitution would seem to require that all records, which would include the papers filed in any common law, equitable or statutory proceeding, be kept at the county seat. The dockets and indexes of such proceedings would seem to be official books and records which are also required to be kept at the county seat.

In an opinion of this office date May 23, 1951 (051-134) to yourself upon a kindred question, it was held “that official action by county officers may be exercised only where authorized by law.” The acts of state and county officials are in law divided into “ministerial acts” and “discretionary acts.” The usual issuance of process in connection with legal proceedings and suits has usually been held to be ministerial acts (50 C. J. 449, §23). It was indicated in *Merchants and Manufacturers’ National Bank v. Pennsylvania*, 167 U. S. 461, 17 S. Ct. 829, 42 L. Ed. 236, text 238, that a statute fixing the time for filing of tax reports with the proper taxing official in effect also fixes the place “for official proceedings are always, in the absence of express provisions to the contrary, to be had at the office of the officer charged with the duties.” Although we find the statement that “in the absence of any statute to that effect, a ministerial act of a clerk is not void, although performed away from his office” (11 C. J. 885, §66) the cited authorities are unsatisfactory as to the right to issue original process in court proceedings, when such process is not issued within the boundaries of the county seat. Upon the general question of the place of performance of official acts by public officials see Annotation in 33 A. L. R. 85.

Where there has been established beyond the county seat of a county a branch of the office of the Clerk of the Circuit Court for that county no original process should issue from such branch office, at least until the courts have finally determined the question. This seems to answer the first question in the negative for the present.

Although we hold above that process should not be issued from a branch office of a Clerk of the Circuit Court located outside of the county seat, we see no reason why process properly issued at the office of the Clerk may not be delivered to the sheriff through a branch office of the Clerk. This seems to answer the second question.

If there is sufficient interest among the bar of the county the question may be quickly determined by the issuance of process from such a branch office and the determination of the validity thereof through a proceeding in prohibition or probably mandamus.

OFFICIAL COURT REPORTERS

January 8, 1951—051-3.

CRIMINAL COURT REPORTER—MISDEMEANOR CASES —PER DIEM

QUESTION: May the Court Reporter for the Criminal Court of Record of Polk County, appointed under the provisions of Ch.

21925, Laws of 1943, charge \$15.00 per day, with the approval of the court, for reporting misdemeanor cases tried in said Court?

To: Honorable Gunter Stephenson, County Solicitor, Criminal Court of Record, Bartow, Florida:

Section 1 of Ch. 21925, Laws of 1943, creates the position of "Criminal Court Reporter" for the counties covered by it. It appears that, according to the 1945 State census, Polk County came within the population bracket specified in said Chapter, and that such a reporter has been appointed for Polk County. It also appears that Polk County is still within said population bracket according to the 1950 Federal census.

The reporter provided for in said Chapter being the "Criminal Court Reporter," I think that he is the official reporter for the Criminal Court of Record of Polk County, in both felony and misdemeanor cases.

However, said Chapter *does not require* that he report any misdemeanor cases, although the provisions of Section 5 setting his fees for making a transcript of the testimony and proceedings of "any trial" are broad enough to apply to misdemeanor cases.

Therefore, in my opinion, it is optional with the said reporter as to whether he will report misdemeanor cases.

If he does report misdemeanor cases, there does not appear to be any statute providing a per diem compensation for doing so. Said Ch. 21925 provides none. I find no other statute that provides any. Section 3 of Ch. 8567, Laws of 1921, relating to Circuit Court Reporters (referred to by you), is no longer in existence. However, §29.03, F. S., contains similar provisions, but they, too, relate to fees for Court Reporters for Circuit Courts and have no application to reporters for Criminal Courts of Record.

Since there is no requirement of law that the Criminal Court Reporter for Polk County report misdemeanor cases, and since it is optional with him whether he will do so, it follows that he can decline to do so unless he is paid a per diem compensation. In the absence of any statute fixing his fees, a duly appointed court stenographer is entitled to a reasonable compensation for his services (60 C. J. 26, "Stenographers," §11). Since no statute fixes a per diem for the Polk County Criminal Court Reporter in misdemeanor cases, he is entitled to a reasonable per diem for such services, whether a reasonable amount be \$15.00 per day or some other sum. Approval by the court of the charge would appear to establish its reasonableness.

Your question is properly answered in the affirmative.

November 7, 1951—051-399

COURT REPORTER—DUAL JOBS—ELIGIBILITY

QUESTION: Is a person eligible to serve in the elective office of Justice of the Peace while at the same time serving as official court reporter of the circuit court?

To: Honorable Clifford M. Gaffney, Official Court Reporter, St. Lucie County, Ft. Pierce, Florida:

Article XVI, §15, Florida Constitution, provides that . . . "no person shall hold, or perform the functions of, more than one office under the government of this State at the same time . . ."

Section 29.01, F. S., provides that the official court reporter of the circuit shall be appointed by the governor upon the recommendation of the circuit judge or judges and shall hold his office during the pleasure of the governor; however, In Re Opinion of the Justices, 120 Fla. 729, 163 So. 76, it was determined that no part of the sovereign power of the state is delegated to the official court reporters authorized by §29.01, F. S., and held that such official court reporters are not state officers but are officially employed court functioners whom the statute authorizes to be commissioned by the governor to be paid at state expense.

The position of court reporter is not an office under the governor of the state, so a person can be the official court reporter for the circuit and at the same time hold the position of Justice of the Peace. I therefore answer your question in the affirmative.

SHERIFFS

March 27, 1951—051-69.

ARRESTS—MUNICIPAL POLICE OFFICERS —SERVICE OF PROCESS

STATEMENT AND QUESTIONS: "The Police Department of this City was called in to investigate an assault with intent to kill. The Police took into custody a man who admittedly did the shooting and beating which constituted the alleged assault with intent to kill. This man was in such an emotional condition that the Chief of Police thought that he should not be put in the small City Jail, but that he should be put in the County Jail and left with the Deputy Sheriff and Jailer with instructions to watch the man and prevent him from committing suicide. The next day the Chief of Police called on the Sheriff for delivery of this man to the Chief and the Sheriff refused to deliver the prisoner, saying that he was investigating the case and was holding the man as a county prisoner. A warrant had been issued by the Justice of the Peace charging the prisoner with assault with intent to kill and the Chief had this warrant in his hand at the time the demand was made upon the Sheriff."

1. "Did the Sheriff have the right to refuse to turn this prisoner over to the City authorities under these circumstances?"

2. "If a criminal warrant issued by a Justice of the Peace or a County Judge is placed in the hands of a municipal police officer such as the Chief of Police, has such police officer any authority to serve such warrant?"

To: Honorable Joseph K. Cooper, Mayor, City of Green Cove Springs, Green Cove Springs, Florida:

Answering your second question first, it is my opinion that the law does not confer upon any municipal police officer the authority to serve warrants issued by a justice of the peace or a county judge. The statutes give that authority to sheriffs and

constables, not to municipal police officers. See §§30.15 (2), 36.11, 37.16 and 901.04, F. S.

As to your first question, it appears that the charge was one which was triable in the state courts; that a warrant had been sworn out in a state court, presumably by the chief of police; and that said warrant was in the hand of the chief of police; when he demanded custody of the prisoner from the sheriff. Under these circumstances, the fair inference is that, when the chief of police, with the justice of the peace's warrant in his hand, demanded the prisoner, he was attempting to serve the warrant for the purpose of subjecting the prisoner to prosecution in the justice of the peace court. As hereinabove pointed out, the chief of police had no authority to serve the warrant. It follows that he had no right to require that the prisoner be delivered to him under and by virtue of the warrant, and that the sheriff had the right to refuse to deliver the prisoner to him under said warrant.

June 19, 1951—051-172.

ARRESTS BY HIGHWAY PATROL—FEES

QUESTIONS: 1. When the sheriff or his deputy are with a State Highway Patrolman and a traffic violation is committed in their presence, is the sheriff entitled to the arrest fee or mileage, although the patrolman makes a report to his department?

2. If a warrant is issued on the affidavit of a patrolman, constable, game warden or other law enforcement officer and given to the sheriff although the defendant has been arrested and maybe given bond, is it necessary that the sheriff make a return on the warrant and is he entitled to the fee for making such a return?

3. Can a sheriff bill the county \$3.00 a day for a servant to be used as a cook in the jail, helping keep the jail clean, and acting as a maid for women prisoners?

To: *Honorable Marshall R. Hayes, Sheriff, Santa Rosa County, Milton, Florida:*

In reply to your first question, the answer will depend upon who has made the arrest. If the arrest has been made by a member of the state highway patrol, the fees that a sheriff would be entitled to for services rendered would accrue after the delivery of the person arrested as outlined in the enclosed opinion No. 047-256.

If however, a sheriff or his deputy, while with a state highway patrolman made the arrest, such sheriff or his deputy would be entitled to the arrest fee and mileage fee, if he personally delivered the person arrested, although the patrolman in the above circumstances is required to make a report to his department; full and complete with all necessary detailed data.

In answer to your second question, reference is made to §30.19 F. S., which requires you as sheriff to execute any writ or other process, civil or criminal, legally issued and directed to you. Therefore the warrant mentioned in your second question would demand a return and if given you, as the executive officer, you should make the return and would be entitled to the return fee.

In response to your third question, it is the duty of the sheriff to keep the county jail in a sanitary condition; to report to the county commissioners and to demand whatever is necessary to keep the jail sanitary. You may bill the county three dollars (\$3.00) per day for the servant hired as provided for in §30.23, F.S.

July 24, 1952—052-230.

COMPENSATION—TRANSPORTING JUVENILE OFFENDERS

QUESTIONS: 1. What compensation should a sheriff be paid for transporting juvenile offenders, pursuant to orders of juvenile courts, to the industrial schools of this State?

2. Where several juvenile offenders are transported together and in a group in the same car and to the same industrial school, is the sheriff entitled to charge mileage for each individual separately, or is he entitled to charge as if only one offender was transported?

To: Honorable Bryan Willis, State Auditor:

Under §955.24, F.S., "the actual expenses shall be allowed the sheriffs of the several counties of the State for services in taking offenders to said Florida Industrial School for Boys, and such fees shall be paid by the county in the same manner as now provided by law." This same rule is adopted by §956.02, F.S., as to the Industrial School for Girls. These provisions of the statutes govern unless the rule has been changed by subsequent legislation.

Under §30.23, F.S., "the fees to be charged by the sheriffs and constables of the State of Florida shall be as follows: . . . *State Hospital and Industrial School for Boys and Girls*; conveying prisoner to per day for himself \$8.00, per day for each guard actually necessary \$8.00, and mileage, per mile each day \$0.15; provided, transportation is not furnished by the state or state institution to which the prisoner is to be conveyed . . ."

The above provision of the statutes was derived from Ch. 26831, Laws of Florida, Acts of 1951. The only difference between the provision in the said 1951 act and Ch. 22587, Laws of Florida, Acts of 1945, is that the per diem for the sheriff was fixed, in the 1945 act, at \$6.00 per day, that of the guard at \$5.00 per day, and the mileage at \$0.12½ per mile. The provision for mileage first appeared in the 1945 act. Under Ch. 20943, Laws of Florida, Acts of 1941, the sheriff was provided with a \$6.00 per diem and the guard with a \$5.00 per diem, there being no provision for mileage in said 1941 act. The said act provided that "the state will furnish transportation." Under Ch. 10091, Laws of Florida, Acts of 1925, the provision was for the conveying of prisoners to the "state prison and industrial school for boys and girls" with the provision that the "state will furnish transportation." The corresponding section in the R. G. S., 1920, was §2891, which made provision for the transportation of prisoners to the state prison; no mention of transportation to the industrial schools being made in said section. The said 1925 act made provision for the first time for sheriff's compensation for transporting prisoners to the industrial schools and the 1945 act provided for mileage in that connection for the first time.

Section 955.24, F.S., above mentioned, was derived from §13, Ch. 4565, Laws of Florida, Acts of 1897, and has been brought forward into the several statutes without change. A review of the above acts of the Legislature clearly indicates an intention on the part of the Legislature to change the rule as provided by §955.24, F. S. (see *Hillsborough County Commissioners v. Jackson*, 58 Fla. 210, 50 So. 423 and *Lykes Brothers v. Bigby*, 155 Fla. 580, 21 So. 2d. 37). Therefore, the provisions of §30.23, F.S., is the controlling statute upon the question. This answers the first question.

Section 30.23, F.S., in providing for the conveying of juvenile offenders to the Industrial School provides for "mileage, per mile each way, . . . \$0.15." This language is similar to that used in connection with fees for "removal of prisoner to or from jail," where the sheriff is entitled to mileage "per mile, each way, . . . \$0.15." In the case of *Taylor v. State ex rel., Coleman*, Fla., 9 So. 2d. 417, the sheriff had moved a prisoner from Williston to Bushnell; it was held that the sheriff was entitled to additional mileage for the prisoner. Such a charge was also approved in the case of *Gray v. Leon County*, 96 Fla. 476, 118 So. 305. See also *Florida Sheriffs' Manual* 193 et seq. On pages 199 and 200 of the *Sheriffs' Manual* it is stated, relative to the transportation of persons to the industrial schools, that "when the transportation is actually furnished by the sheriff and not the state, the sheriff is entitled to mileage computed as other officer and prisoner mileage is computed." We are inclined to agree with the above statement of the law in the *Sheriffs' Manual*. This answers the second question.

July 23, 1951—051-236.

GUARD OR JAILER—EMPLOYMENT—REIMBURSEMENT

QUESTIONS: 1. Is it compulsory for a board of county commissioners to reimburse the sheriff for monies paid for employing a guard?

2. Is the term jailer synonymous with the term guard?

To: *Honorable Joseph C. Jacobs, Representative, Suwannee County, Live Oak, Florida:*

The employment of a jailer or guard is considered a necessary expense for the safekeeping of prisoners and the sheriff is entitled to be reimbursed by the board of county commissioners for actual amounts paid by him for such guard services, not in excess of \$5.00 per day up to and including June 30, 1951, and not in excess of \$8.00 per day after June 30, 1951, which will be in accordance with Ch. 26821, which amends §§30.23 and 30.25, F.S.

Since the law makes no provision for services of the jailer, we understand that it is customary for the sheriffs to employ a guard as a jailer and bill the county for the services of the guard, as provided for in Ch. 26821, Acts of 1951.

September 17, 1952—052-275.

TERM OF OFFICE—INTERIM APPOINTMENT

QUESTION: In August, 1950, the Governor suspended from office the person theretofore elected Sheriff of Polk County, and

appointed Hagan Parrish to the office, the latter's commission providing that Parrish's term was "from August 28, 1950, until the end of the next ensuing session of the Senate unless appointment be sooner made and confirmed by the Senate pending . . ." the suspension of the incumbent sheriff. At its 1951 session the Senate removed from office the then Sheriff of Polk County, but it does not appear that Parrish received any further appointment or commission from the Governor.

The office of Sheriff of Polk County is required to be filled at the November general election for the four-year term beginning on the first Tuesday after the first Monday in January 1953.

Does Parrish's term extend to the date last mentioned or may the candidate elected at the coming general election assume the office immediately after his election?

To: Honorable Paul Ritter, Winter Haven, Florida:

It is well to preface this opinion with the statement that the person to whom it is addressed is seeking this advice for and on behalf of Sheriff Hagan Parrish, who in his official capacity, is entitled to it.

For the purposes of this opinion it is not deemed necessary to labor the point of whether the Governor should have reappointed or recommissioned Parrish, or some other person, to fill the unexpired term which remained after the removal of the previous sheriff. In the case of *State v. Baxter*, 122 Fla. 312, 165 So. 271, it was stated that an office was not vacant when it was filled by someone who had a lawful right under some constitutional or statutory authority to hold the office for a fixed term or until the happening of some future event. Since Parrish did have a lawful right to the office for the period specified in his commission by virtue of the Governor's having exercised the power of appointment granted him by Art. IV, §15, of the Constitution of Florida, there has been no vacancy in the office.

Article XVI, §14, of the Constitution requires that officers continue in office after the expiration of their terms until their successors are duly qualified. No successor to Parrish having been chosen, he has properly continued in office and should so continue until his successor is qualified.

Since the Constitution specifies that all terms of office, unless specifically excepted, shall begin on the first Tuesday after the first Monday in January, the term of office for which the successful candidate for Sheriff of Polk County will be elected will not begin until January 6, 1953; and such candidate, even though he were elected, would not be eligible to assume the duties of the office by virtue of his election alone until January 6, 1953.

October 23, 1951—051-372.

COURTS—ATTENDANCE FEES—NONRESIDENT COUNTIES

QUESTION: Is the sheriff entitled to the attendance fee for attending court in a county other than the county of which he is sheriff?

To: Honorable Cecil A. Rountree, County Attorney, Chipley, Florida:

Section 30.15 (4), F.S., limits the powers and duties of a sheriff in so far as your question is concerned to the courts of the county in which the sheriff is elected to serve. I know of no authority for the payment of an attendance fee for sheriffs in courts outside those of his own county.

Your question is therefore answered in the negative.

September 24, 1951—051-326

SMALL CLAIMS COURT—PER DIEM—JEFFERSON COUNTY

QUESTION: Is the Sheriff of Jefferson County, Florida, entitled to a per diem payment by the board of county commissioners for his services in attending the small claims court of Jefferson County, Florida, as the executive officer thereof?

To: Hon. Prentice P. Pruitt, Judge of Small Claims Court, Jefferson County, Monticello, Florida:

It appears that it was the intent of the legislature in creating the court in question that the sheriff should receive the same compensation with respect to this court as that received for similar services in the circuit court of Jefferson County.

Chapter 26821, Laws of 1951, provides for fees and compensation of sheriffs and constables. It states, in part, §30.23, F.S., is amended to read, "... attendance on all courts for each court per day . . . \$8.00."

I do not think, however, that the language of Ch. 27316, Acts of 1951, makes it mandatory for the court to have a bailiff present. In other words, if the judge of the court in question considered it necessary to have the sheriff present in court for some particular reason, he is authorized to request the sheriff to attend and it would be the duty of the sheriff to comply with said request. Ordinarily, however, I do not believe it would be necessary for the sheriff to attend meetings of this court since it is not a criminal court.

Your question is answered in the affirmative.

September 5, 1951—051-303.

FLORIDA SHERIFFS' ASSOCIATION—DUES AS OFFICE EXPENSES

QUESTIONS: 1. Are dues paid by the various sheriffs of this state to the Florida Sheriffs' Association, a chartered non-profit association of the sheriffs of Florida, organized for and dedicated to the promotion of better law enforcement, a proper charge against the expenses of the sheriff's office?

2. If the answer to the first question is in the affirmative, may the amount of such dues be prorated among the sheriffs, according to the population of the various counties?

To: Honorable Alex Littlefield, Sheriff, Secretary-Treasurer, Florida Sheriffs' Association:

Several prior opinions issued by my predecessors in office may

serve to determine the answer to your first question. On March 14, 1930, the then Attorney General, Hon. Fred H. Davis, ruled that county commissioners have the right to provide for the attendance of one or more of their members at the State Association of County Commissioners when it meets for the purpose and acting upon matters of public welfare, which relate to their official duties and powers, provided the payment of such expenses is properly arranged for in the county budget (see 1929-30 Biennial Report, page 296). This ruling was reaffirmed in a later opinion issued by Attorney General Cary D. Landis on February 13, 1933, wherein he stated that if provision has been made in the budget, expenses incurred by county commissioners in attending the State Association of County Commissioners could be paid from county funds, provided such expenses were kept within reasonable limitations (see 1933-34 Biennial Report, page 211). Then, on March 22, 1935, General Landis further held that, under the same reasoning employed in the opinion of March 14, 1930, he was of the opinion that county commissioners are authorized to pay reasonable annual dues or membership fees to the State Association, when provision therefor has been made in the county budget (see Biennial Report 1935-36, page 236). In addition, on August 29, 1949, I ruled that the board of county commissioners of a county may pay compensation in the sum of \$200 to the U. S. Highway 41 Association to further an authorized county purpose, such as promoting the repair and reconstruction of U. S. Highway 41 through the county, so long as it is done in good faith and does not constitute "personal influence" or "lobbying," and the payment is a reasonable one (see 1949-50 Biennial Report, page 380).

The federal courts have frequently ruled that attendance at professional and business association meetings by lawyers and other professional or occupational groups constitutes a proper and legitimate expense incident to the profession or business, which is chargeable against the income tax. Courts have also ruled that the attendance of public officers upon meetings and conferences held with other officers of other jurisdictions for the purpose of discussing and settling problems of mutual interest, constitute a proper expense payable out of public funds as having been performed in the course of official duties. For example, in the case of *Adams vs. Lott*, 112 Fla. 49, 150 So. 596, our Supreme Court held that a board of county commissioners could pay the expense of having any of its members attend the state road department public hearings to offer suggestions or complaints as to why the budget should include repairs to the roads or bridges in their counties.

In further support of this theory, it must be noted that it has been the practical departmental construction of most state agencies and county officials for many years to recognize and pay dues to official organizations as legitimate expenses of the office, and, in so far as I am aware, this practice has never been questioned by the state auditor, comptroller or other agency having supervision of public funds.

Based on the foregoing authorities, then, it appears to me that if the Florida Sheriffs' Association meets the requirements established, i.e., that it is organized in the interest of the public welfare,

that its activities relate to official duties and powers, that it benefits the people generally, and its dues are reasonable and used for legitimate purposes, then the expenditure of funds to defray the cost of reasonable dues or membership fees would be a proper charge against the expenses of the sheriff's office. As I understand the functions of the Association, it appears to meet these requirements, for it must be recognized that the advancement of law enforcement through the mutual exchange of ideas, techniques and information, the establishment of uniform procedures, methods of mutual assistance and cooperation, and the sponsoring of training courses, etc., all of which activities are conducted by the Association, contribute to the public welfare and directly benefit the people generally by promoting better law enforcement among the various sheriffs of the state. Therefore, it is my opinion that your first question may be answered in the affirmative.

As to your second question, I see no legal reason why the amount of dues paid to the Association cannot be prorated among the various sheriffs on an equitable and fair basis. Certainly, it appears logical that the larger counties not only stand to gain more in the way of benefits from the activities of the Association, but also are more able financially to defray a larger part of the necessary expenses, so that a classification of fees based on the population of the various counties seems to be fair and reasonable. Many of our laws are based on some similar pro rata method; for example, the distribution of the two cent constitutional gasoline tax is based partly on population; the salaries of certain county officials, such as juvenile court judges, are based on population figures; representation in the Legislature is according to population of the various counties, and other similar instances may be found. Hence, it would seem entirely fair and equitable to base the dues or fees of your Association on such a reasonable classification.

Of course, the joining or paying of dues to the Association must be on a strictly voluntary basis, at the discretion of each individual sheriff, but if agreed to by each sheriff concerned, I see no reason why the dues could not be assessed at varying rates, so long as such rates are reasonable and just, based on the population of the county in which the particular sheriff holds office.

Such a voluntary agreement and classification would not, in my opinion, violate any legal or constitutional provision and it therefore appears that your second question may be also answered in the affirmative.

September 11, 1951—051-310.

RADIO EQUIPMENT—OPERATORS—SALARIES

QUESTION: Does paragraph 1, §2, Ch. 26947, Laws of 1951 (§125.45, F.S.) include salaries of the necessary operators of radio equipment for operation 24 hours a day and 7 days a week?

To: *Honorable Hugh Culbreath, Sheriff, Hillsborough County, Tampa, Florida:*

The language in §2 (1) of Ch. 26947, Laws of 1951 (§125.45, F.S.) specifically mentioning "services" and "operation and maintenance of radio equipment" indicates an intent on the part of the leg-

islature that this section is intended to apply to salaries of trained operators necessary to the operation of the radio equipment as well as to the maintenance of the radio equipment itself.

Your question is therefore answered in the affirmative.

September 20, 1951—051-324.

SHERIFFS—RESIDENCE REQUIREMENTS

QUESTION: Please advise if a sheriff is allowed to live a distance of twenty-five miles from the county jail and courthouse while he is in office?

To: *Honorable Dan L. Brock, Sheriff Washington County, Chipley, Florida.*

Art. XVI, §4, provides:

"Location of county offices; residence of clerk and sheriff.—All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties; and the Clerk and Sheriff shall either reside or have a sworn deputy within two miles of the county seat."

Section 114.01, F. S., provides, in part:

"Every office shall be deemed vacant in the following cases:

. . . .

"(4) By his ceasing to be an inhabitant of the state, district, county, town or city for which he shall have been elected or appointed."

Section 30.11, F. S., provides:

"Place of residence.—The sheriff, or his deputy, shall reside at the county seat or within two miles thereof."

Based on the above, and assuming that your county has no special act relating to your question, it would appear that a sheriff may reside anywhere in the county in which he was elected to serve as sheriff provided he has a deputy who resides within two miles of the county seat.

CRIMINAL COURT OF RECORD

February 2, 1951—051-25.

JUDGE—COUNTY SOLICITOR PRIOR TO APPOINTMENT —DISQUALIFICATION

QUESTIONS: 1. Is the Judge of the Criminal Court of Record disqualified to try cases pending in said court in which the informations were signed by him as Acting County Solicitor prior to his appointment as such judge?

2. Is said Judge disqualified to try cases filed in said court before his appointment as judge and in which he participated or consulted witnesses as First Assistant County Solicitor?

To: Honorable William T. Harvey, Judge Criminal Court of Record, Jacksonville, Florida:

It appears that the judge was of counsel in those cases in which he signed the informations as Acting County Solicitor and in those cases in which he examined witnesses or otherwise participated as First Assistant County Solicitor. Therefore, I am of the opinion that he is disqualified to try all such cases and that the above stated questions are properly answered in the affirmative. (See *Tampa Street Railway & Power Co. v. Tampa Suburban Railway Co.*, 11 So. 562; *State ex rel. Ambler v. Hocker*, 15 So. 581; *Sewell v. Huffstetler*, 93 So. 162; 48 C. J. S. 1067, Judges, §83-a.3).

October 2, 1951—051-344.

WITNESS FEES—STATE EMPLOYEE—MILEAGE —PAYMENT

QUESTION: When a state employee testifies at a trial in a Criminal Court of Record as an expert witness for the state, should he be paid by the county for mileage and fees as an expert witness, or should he be paid by the state as is the usual procedure when state employees travel?

To: Honorable Harry Dongo, Clerk, Criminal Court of Record, Key West, Monroe County, Florida:

A search of the Florida Statutes reveals no statute prohibiting the payment of witness fees and mileage to state employees for testifying in a case. Accordingly, it follows that under the statutes a state employee is entitled to witness fees and mileage the same as any citizen of the state. Prior opinions of this office dated December 10, 1935, and December 22, 1939, (see 1935-36 Biennial Report of the Attorney General, page 686, and 1939-40 Biennial Report of the Attorney General, page 89) indicate also that there is no objection to the payment of such fees to state employees appearing in and testifying in a case.

I note from your communication that the witness was notified by letter to be present and that he was not served with a subpoena until he reached Key West. I do not believe, under the circumstances, that the question as to whether he was served with a subpoena before or after leaving the place of his residence is material.

I understand that by custom and administrative practice such compensation has generally been paid by the county rather than by the state. To require the state in all cases to pay its employees' mileage and witness fees might, in many cases, impose a burden on the state.

Notwithstanding the law authorizes the county to pay state employees witness and mileage fees, there may be cases where a state agency would of its own volition instruct its employees appearing as witnesses not to insist upon the county paying such fees. For example, in some cases the state agency, whose employee is called as a witness, may have a direct interest or duty in the case, particularly where the agency is seeking the enforcement of laws which directly affect the agency or its duties. In these cases the state agency may feel it advisable to pay the expenses

of its employee who appears as a witness, where the witness gives testimony on behalf of the agency or department.

However, in another class of cases in which the interest of the state agency is nominal or incidental the rule would be different. In such cases the state employee would be testifying as a service to the county or officials therein, independent of his usual employment and regular duties. In this latter class the county should pay him mileage and fees.

As a practical solution it is believed that where state employees are to be used as witnesses, an agreement in advance between them and the state agency or department as to whether the agency or the county should pay their expenses as witnesses, might be advisable if there is any question as to who should pay such expenses.

If no such prior understanding is arrived at, there is nothing to prevent the state employee as a citizen requiring his witness fees and travel expenses be paid him by the county.

CIVIL COURT OF RECORD

September 14, 1951—051-318.

JUDGE—APPOINTMENT—TENURE OF OFFICE

STATEMENT AND QUESTIONS: Honorable Silver S. Squarcia was appointed by the Governor (and commission issued) to that office of Judge of the Civil Court of Record in and for Dade County, created by §33.14, F.S., as amended by Ch. 27003, Laws of 1951, "from the 11th day of July, A. D. 1951, until the end of the next ensuing session of the Senate, unless an appointment be sooner made and confirmed by the Senate."

(1) If the appointment of said appointee to such office is confirmed at the next ensuing session of the Senate, what term of office should be set forth in the commission then issuable to him?

(2) Is there any legal impediment to such appointee now bringing to a conclusion certain chancery cases he was handling as attorney at and before his appointment?

To: Honorable Silver S. Squarcia, Civil Court of Record, Dade County, Miami, Florida:

It appears that the Civil Court of Record in and for Dade County was created in pursuance of Ch. 33, F.S. That chapter was originally Ch. 11357, Laws of 1925. It created a civil court of record in each county in the state which had a population of more than 100,000 according to the last preceding state census; there being excepted from the effects of the act the Civil Court of Record of Duval County, then existing under Ch. 8521, Laws of 1921. Section 33.01 was successively amended to increase this population figure to 250,000 (Ch. 20739, Laws of 1941) and to 260,000 (Ch. 21819, Laws of 1943, and Ch. 23688, Laws of 1947).

Section 33.03 provides that there shall be a judge for each of said courts, "who shall be appointed by the Governor and con-

firmed by the senate, and who shall hold office for four years." Another part of this section provides that such judge, "shall not exercise the profession or employment of counsel or attorney at law, or engage in the practice of law during his term of office, *except in matters of chancery.*" (Emphasis supplied.)

Section 33.14 was added in 1943 (Ch. 21868, Laws of 1943), whereby it was provided, among other things, that in counties "having a population of two hundred sixty thousand or more, according to the latest census taken pursuant to law, every civil court of record established pursuant to statute" shall have "two judges who shall draw the same compensation." Section 33.14 was further amended by Ch. 27003, Laws of 1951, to provide that in such counties said courts shall have "three judges who shall draw the same compensation."

The appointment here involved is to the newly created office of third judge of said court in Dade County in pursuance of said last mentioned amendment. The commission issued contains the following wording:

"Whereas, Silver S. Squarcia has been duly appointed by the Governor according to the Constitution and Laws of said state, to be Judge of the Civil Court of Record, in and for Dade County, from the 11th day of July, A. D. 1951, until the end of the next ensuing session of the Senate, unless an appointment be sooner made and confirmed by the Senate."

The above questions are answered as follows:

(1) Section 33.14 as amended by Ch. 27003, Laws of 1951, created the office of the third judge of the civil court of record in those counties described in such amended section. It was a new office. Civil Courts of record are statutory courts, their creation authorized by amended §1, Art. V, Florida Constitution. The office here involved is a statutory office. Cycles of terms of office begin with the first appointments unless otherwise provided (*State vs. Bird*, 163 So. 248; *State vs. Collins*, 134 So. 595; *State vs. Amos*, 133 So. 623). Thus, the four-year cycle of the term of office here involved begins with July 11, 1951. (A distinction is to be drawn between the situation here found and that dealt with in *Advisory Opinion to the Governor*, 42 So. 2d. 170).

The above-quoted wording from the commission issued to this appointee appears proper. Upon confirmation by the Senate at its next ensuing session, commission should then issue for the unexpired four-year term which began on July 11, 1951 (*State vs. Collins*, supra; *Advisory Opinion to the Governor*, 82 So. 612; *State vs. Bird*, supra). On the basis of the foregoing, it is not apparent that nominations for the unexpired term of this appointive office would be proper in the 1952 primaries.

(2) There appears to be no impediment to this appointee bringing to conclusion in the courts where pending chancery cases in which he was attorney at the time of his appointment as said judge. See above-quoted provision from §33.03. Hence, the question is answered in the negative.

COUNTY JUDGE'S COURTS

March 22, 1951—051-60.

PROSECUTING ATTORNEYS—COMPENSATION

QUESTIONS: 1. In a criminal prosecution in a County Judge's court, do the conviction fees accrue to the Prosecuting Attorney serving at the time and date of the conviction or to the Prosecuting Attorney serving at the time the Affidavits were filed before the County Judge?

2. Does the Criminal Procedure Law (Ch. 19554, Laws of 1939) apply to criminal proceedings in a County Judge's Court or should said court be governed by the provisions of Ch. 937, F. S.?

To: *Honorable Clyde Campbell, Prosecuting Attorney, Okaloosa County, Crestview, Florida:*

AS TO THE FIRST QUESTION

In a previous opinion (Opinion No. 050-575, dated December 21, 1950) when called upon to construe this question, I stated that: "It seems clear from these statutes that a conviction is a condition precedent to the collection of a fee by the prosecuting attorney."

I still hold to that view; hence, I do not believe that the prosecuting attorney who was serving at the time the affidavits were filed before the County Judge, but not thereafter, would be entitled to the *conviction* fee.

Perhaps, the author of the statute, in providing a conviction fee to the prosecuting attorney, contemplated that such prosecutor perform the duties leading up to the conviction; however, it certainly was not intended in a case as this that neither party be compensated for the conviction. It is, therefore, my opinion that the prosecuting attorney serving at the time of the conviction is entitled to the fee, since such result is more in accord with the language of the statutes.

AS TO THE SECOND QUESTION

Section 925.02, F. S., is a general provision and, in the absence of any specific provision with respect to a criminal prosecution in a county judge's court, would seem to apply to prosecutions in said court.

However, Ch. 937, F.S., specifically refers to County Judge's Courts, among others.

Since Ch. 937 specifically refers to the courts, here being considered, it is my opinion that in the event of an irreconcilable conflict between the provisions of the Criminal Procedure Law (Ch. 901-925, F. S.) and the provisions of Ch. 937, the latter would control. In all other instances, the provisions of the Criminal Procedure Law, where applicable, should be followed with respect to criminal proceedings in a county judge's court.

In this connection I call your attention to the case of *State ex rel Oliver v. Moorhead*, 151 Fla. 845, 10 So. (2d) 576, wherein only

those sections of Ch. 937 relating to the method of bringing prosecutions were involved.

Your question is most general and it is difficult to discuss a problem of this magnitude in generalities. It might be wiser to determine whether or not a particular section of Ch. 937 or a particular section of the Criminal Procedure Law is applicable to the specific problem that you might have in mind.

March 20, 1952—052-95.

PROSECUTING ATTORNEY—BOND ESTREATURES— COMPENSATION

QUESTIONS: 1. What compensation, if any, is the Prosecuting Attorney of the County Judge's Court of Leon County, entitled to for bond estreatures in the County Judge's Court?

2. If your answer in reply to question number one is that there is no statutory authority for the payment of such estreature fees, please advise whether or not by custom of payment of such estreature fees over a period of many years would now validate the future payment and/or past payment?

To: *Honorable George G. Crawford, Clerk, Circuit Court, Leon County, Tallahassee, Florida:*

The office of Prosecuting Attorney of the County Judge's Court of Leon County, was created by Ch. 14828, Laws of 1931.

Section 4 of said chapter, providing the compensation of the prosecuting attorney, does not in any way provide for a fee to be paid to said Attorney for services in bond estreatures. This act is a special act, as the prosecuting attorneys of county judges' courts are generally appointed by the county commissioners under the provisions of §§125.01 (3) and 125.03, F. S.

It is true that the general law provides for the office of prosecuting attorneys of County Courts to be elected, §34.10, F. S., and that the compensation of prosecuting attorneys of County Courts includes 10 per cent of each cash bond estreated in his court in connection with which an investigation is made and an information filed (§34.11, F. S.). However, the Prosecuting Attorney of the County Judge's Court of Leon County, is not the prosecuting attorney of a County Court and his compensation can only be determined by what the legislature has provided.

In the case of *State ex rel. Lewis v. Garrett*, 178 So. 309, the Supreme Court of Florida held that it is competent for the legislature, by special or local act, to create the elective office of county attorney and to prescribe his term of office, define his powers and duties and fix his compensation. The act there under consideration, Ch. 18609, Laws of 1937, was very similar to the act creating the office of Prosecuting Attorney of the County Judge's Court of Leon County, Ch. 14828, Laws of 1931, the only substantial difference being that the act applicable to Jackson County provided that the county attorney should also serve as attorney to the Board of County Commissioners in addition to his duties as prosecutor. In upholding the validity of Ch. 18609, Laws of 1937, the Supreme Court said:

"It is quite true that chapter 18609 as to Jackson County changes the general law, section 2153, Compiled

General Laws of 1927, authorizing boards of county commissioners to designate a county attorney, but section 5 of article 8 of the Constitution provides, among other things, that the powers, duties, and compensation of county commissioners shall be prescribed by law. The matter of designating a county attorney and fixing his compensation is a mere incident to the general powers and duties of county commissioners, and under the plenary power vested in the Legislature to regulate such powers, certainly it is competent to change the law for designating a county attorney in any one or all of the counties."

The Supreme Court of Florida has, on at least two previous occasions, held that the payment of excess or illegal fees to county fee officers is not validated by waiver, laches or estoppel. *State ex rel. Henderson v. Foley*, 160 So. 522 and *State ex rel. White v. Foley*, 182 So. 195. In the case of *State ex rel. Henderson v. Foley*, *supra*, the Supreme Court of Florida said:

"Such estoppel, waiver, or laches as is here pleaded by respondents could only bar, at most, a recovery of moneys heretofore finally and permanently accounted for and already paid in to the county without protest during the past accounting periods. It can never be effective for the purpose of setting up in future an irrevocable and ambulatory rule of legal conduct binding on the officer as to his unsettled current or future accounts in contravention of a standing and permanent general statute of the state, the admitted existence of which is plainly inconsistent with the idea that there is to be observed or enforced any conflicting local rule on the subject. An officer cannot by laches, waiver, or estoppel become permanently bound to follow in his current and future management of his official responsibilities a course of past official conduct that has no sanction of law, and that would be in plain contravention of an admittedly applicable and inconsistent general law on the precise subject to which the alleged laches, waiver, or estoppel is sought to be applied."

The Prosecuting Attorney of the County Judge's Court of Leon County, is not entitled to compensation for bond estreatures in the County Judge's Court and that the custom of payment of such estreature fees over a period of many years would not validate the future payment of estreature fees as compensation to such Prosecuting Attorney.

JUSTICES OF THE PEACE COURTS

March 26, 1951—051-63.

COUNTY COMMISSIONERS—JUSTICE OF PEACE DISTRICTS—ABOLISHMENT

QUESTION: Do the county commissioners of Bay county, acting under Ch. 37, F. S., have power and authority to abolish or change justice of the peace districts in view of Art. 5, §21, of the Florida Constitution?

To: Honorable Ira L. Hill, Chairman, Board of County Commissioners, Bay County, Panama City, Florida:

Chapter 37, F. S., provides for the creation of justice of the peace districts by the board of county commissioners, the enlargement of and alteration of districts (§§37.04, 37.06, 37.07, F. S.).

The Florida Supreme Court in construing §21, Art. 5 in the case of *Wilson v. Crews*, 160 Fla. 169, 34 So. 2d. 114, reached the following conclusion:

"Constitutional amendment authorizing legislature by special act to change boundaries of any justice district 'now or hereafter' established and to establish new or abolish any district 'now or hereafter' existing vested exclusive power in legislature to establish or abolish districts and change their boundaries, and divested county commissioners of all express power to divide county into districts, as well as implied power to establish, abolish or change boundaries, generally exercised by them prior to adoption of amendment."

Your question is therefore answered in the negative.

August 17, 1951—051-278.

CONSTABLES—APPOINTMENTS—DEPUTY BROWARD COUNTY

QUESTION: Can you, as Constable of the Justice of the Peace District 2, in Broward County, appoint another deputy constable in your district by virtue of the provisions set forth in Ch. 16007, Laws of 1933, although at present you have a deputy constable that was appointed by you as provided for by Ch. 26413, Laws of (Extraordinary Session) 1949?

To: Honorable W. D. Dan Overton, Constable, Broward County, Pompano Beach, Florida:

Since there is at present one duly qualified deputy constable which you state was appointed pursuant to the provisions of Ch. 26413, Laws of (Extraordinary Session) 1949, it is my opinion that you cannot appoint another deputy constable in your district inasmuch as the language in Ch. 16007, Laws of 1933, in §1, states:

"... the regularly elected or otherwise duly authorized and qualified constable ... may appoint not more than one deputy constable ..."

December 19, 1951—051-468.

JUSTICES OF PEACE—DUAL JOBS—PROHIBITIONS

QUESTION: May a person hold, and perform the functions of, the offices of Justice of the Peace in a Florida county and United States Commissioner at the same time?

To: Honorable Vernon W. Turner, Justice of Peace, Homestead, Dade County, Florida:

Article XVI, §15, Florida Constitution, provides among other things, that no person holding or exercising the functions of any

office under the government of the United States shall hold any office of honor or profit under the government of this state. A Justice of the Peace is a constitutional officer. *Article V, §21, Florida Constitution*. There seems to be little doubt that the position of United States Commissioner is an office under the government of the United States within the meaning of *Art. XVI, §15 Florida Constitution. Chapter 43, Title 28, U.S.C.A.* Hence, the question is answered in the negative, that is to say, that a person may not hold, and perform the functions of, the offices of Justice of the Peace in a Florida county, and United States Commissioner, at the same time.

December 19, 1951—051-470.

ARRESTS—CONSTABLES—SHERIFFS—COURT ATTENDANCE FEES

QUESTION: If a constable takes a person arrested by him to the county judge's office and such person pleads guilty, is the constable's right to collect the statutory fee for attending court defeated by the fact that the sheriff earns and is paid the statutory fee for attending the same court on the same day?

To: Honorable Robert H. Ray, Constable, Apalachicola, Franklin County, Florida:

The Supreme Court of Florida held in the case of *Calhoun County v. Liddon*, 103 Fla. 833, 138 So. 389, that a sheriff is entitled to an attendance fee for attending court when he carries a person arrested and charged with a crime before the county judge for hearing, and that his attendance on said court is completed with the entry of a plea of guilty or the waiver of examination and fixing the amount of bond. Under \$36.11 of the Florida Statutes, the constable is just as much the executive officer of the County Judge's Court as is the sheriff, and \$30.23 of said statutes gives the constable the same right to a fee for attending court as it gives the sheriff.

October 29, 1952—052-299.

CONSTABLES—FEES—COURT ATTENDANCE— MILEAGE

QUESTIONS: 1. Can a constable who attends the Justice of the Peace Court in his district and on the same day attends the County Judge's Court claim two court attendance fees?

2. Is a constable entitled to mileage in transporting a prisoner from jail to the Justice of the Peace Court and back to jail if the prisoner fails to make bond?

To: Honorable L. E. Green, Constable, Orange Park, Florida:

Chapter 26821, Laws of 1951, regulates the fees and compensation of sheriffs and constables of the State. The applicable provision of Ch. 26821 provides as follows:

"Attendance on all courts for each court per day
\$8.00."

Section 36.11, F. S., provides:

"The sheriff of the county or any constable shall be the executive officer of the county judge's court . . ."

Section 37.16, F. S., provides:

"The sheriff or any constable of the county shall be the executive officer of the courts of justice of the peace . . ."

A constable, in order to be entitled to claim two court attendance fees as provided by the above quoted section of Ch. 26821, Laws of 1951, in the situation presented in Question One, must be designated by the County Judge under the provisions of §36.11, F.S., and by the Justice of the Peace under the provisions of §37.16, F.S., to attend each court in the performance of the official duties as executive officer in the same day. (See opinion 051-15). A sheriff or constable must also fulfill his official duties as executive officer before he can claim an attendance fee for either court. The mere presence of a sheriff or constable in either court as a witness or in some other unofficial capacity would not entitle him to an attendance fee. No matter how many times a sheriff or constable may attend either court on the same day, he would be entitled to only one attendance fee for each court. Accordingly, your first question should be answered in the affirmative if you are designated by the Justice of the Peace and the County Judge to serve as executive officer in each court on the same day and you perform the duties as executive officer in each court.

Chapter 26821, Laws of 1951, further provides:

"Removal of prisoner to and from jail per mile . . . \$.15."

Under this provision of the statutes, you would be entitled to mileage in transporting such prisoner from jail to the Justice of the Peace Court and back to the jail. Your second question should also be answered in the affirmative.

JUDGES

May 17, 1951—051-123.

SMALL CLAIMS COURTS—ESTABLISHMENT —EX OFFICIO JUDGE

QUESTIONS: 1. Where a small claims court is established in one of the counties of this state, pursuant to §1, Art. V, of the State Constitution, as amended in 1914, may it be provided that the said court may use the court room when it is not in use by another court?

2. In the case of the establishment of such a small claims court may it be provided that the judge and clerk thereof shall be appointed instead of being elected?

3. In the case of the establishment of such a small claims court may the county judge and his clerk be made ex officio the judge and clerk of such court?

To: *Honorable D. P. McKenzie, House of Representatives, CAPITOL:*

Under §1, Art. V, of the State Constitution, as amended in 1914, the establishment of civil courts of record (*State v. Barrs*,

105 Fla. 27, 140 So. 908), courts of crimes (State v. Sullivan, 95 Fla. 191, 116 So. 255 and Cary v. State, 141 Fla. 866, 194 So. 213), juvenile courts (Gore v. Chapman, 143 Fla. 438, 198 So. 840 and State v. Quigg, 83 Fla. 1, 90 So. 695) and civil claims courts (State v. Parks, Fla., 43 So. 2d. 347) have been upheld. These being regular courts established pursuant to law, we see no reason why they should not be permitted to use the court room of the county when available. The civil courts of record, some juvenile courts, courts of crimes and the civil claims courts appear to use the court house and in some instances they have court rooms regularly assigned to them. The first question is answered in the affirmative.

Under §27, Art. III, of the State Constitution, it is provided that "the legislature shall provide for the election by the people or appointment by the governor of all state and county officers not otherwise provided for by this constitution." There is no other provision of the constitution covering the officers of small claims courts. Under this constitutional provision when additional county officers are created they must either be elected or appointed by the governor. The legislature having the alternative they may either provide for election or appointment of any county office created by it. The second question is, therefore, answered in the affirmative.

Under Ch. 25574, Acts of 1949, which created a civil claims court, it was provided that the senior circuit judge, or another circuit judge to be designated by him, should be judge of the said civil claims court. This statute was upheld in State v. Parks, Fla., 43 So. 2d. 347. A statute providing that the clerk of a criminal court of record should act as clerk of a civil court of record was upheld in Flood v. State, 100 Fla. 70, 129 So. 861; statutes providing that a board of county commissioners should be ex officio an air base authority (see State v. Gordon, 138 Fla. 312, 189 So. 437) or of an inlet district authority (State v. Reardon, 114 Fla. 755, 154 So. 868) have been upheld; as have other statutes adding additional duties to existing officers (Amos v. Matthews, 99 Fla. 1, 126 So. 308 and Advisory Opinion 146 Fla. 622, 1 So. 2d. 636). In the light of these authorities, and especially State v. Parks, supra, we feel that a small claims court may be established with the county judge as ex officio judge thereof. The third question is, therefore, answered in the affirmative.

July 25, 1952—052-233.

SMALL CLAIMS COURT—DISQUALIFICATION— EXECUTIVE ORDER ASSIGNMENT—COMPENSATION

QUESTION: Where the judge of a small claims court is disqualified in a particular case and another judge is assigned by the governor to hear and determine such case what compensation and reimbursement of expenses is the assigned judge entitled to and by whom is the same payable?

To: Honorable Angus W. Harriett, County Attorney, Palatka, Fla.:

Your question, as posed in your request for opinion, seems to relate to the assignment of the judge of the small claims court in Nassau County, Florida, (which court was established and exists under Ch. 27268, Laws of 1951) to hear and determine one or more cases pending in the small claims court in Putnam County,

Florida (which court was established and exists under Ch. 26787, Laws of 1951) because of the disqualification of the judge of the said Putnam County court. Said Ch. 26787 containing no provision for the substitution of judges upon the disqualification of the judge of the said court, the substitution, by assignment by executive order, was made under and pursuant to §§38.09 et seq., F.S. (see Advisory Opinion to the Governor, Fla., 58 So. 2d. 319). Section 42.09, F. S., being §9, Ch. 26920, Laws of 1951, having no application (see said Advisory Opinion).

We find nothing in the general laws of this State nor in said Ch. 26787, providing compensation and expenses for the judges of small claims courts assigned as aforesaid. The general appropriations acts have for many years made provision for paying the expenses of the circuit judges and criminal court of record judges assigned pursuant to said §§38.09 et seq., F. S. These moneys are paid from state funds.

Compensation and expenses of county judges assigned to hear and determine a particular case in another county where the local county judge is disqualified is paid by the litigants pursuant to §36.06, F. S. (consisting of the fees in the case, travel expenses and a per diem of \$3.00 per day). Said per diem and travel expenses are taxed as costs. The county judge so assigned is not required to go to the county to which assigned until his said per diem and expenses are secured to him. As small claims courts are designed to keep the costs of litigation down, it is doubted that the rule applicable to county judges could be applied to judges of small claims courts.

Public officers have claim for official services only when law provides compensation; services are deemed gratuitous otherwise (*Rawls v. State*, 98 Fla. 103, 122 So. 222; *State v. Fussell*, 157 Fla. 55, 24 So. 2d. 804; *Gavagan v. Marshall*, Fla., 33 So. 2d. 862). We fear that the judge so assigned would not be entitled to anything more than the fees in the case or cases he was assigned to hear and determine. We find no provision for per diem and expenses. Under §38.11, F.S., judges assigned by the governor pursuant to §§38.09 et seq., F. S., "may discharge such duties either in *his own* or any other jurisdiction . . ." Doubtless, this provision was inserted in the statutes to save the assigned judge from having to go to the county wherein the litigation is pending, thereby incurring no expense in going to such county.

Although the following advice will render little, if any, assistance in cases where expenses have already been incurred by judges when assigned going into the other county, it is suggested that the judge when assigned set the case for hearing in his county unless the litigants secure his costs and expenses in going to the county wherein the litigation is pending. This procedure would seem to be authorized by said §38.11. The provisions of §36.06, F. S., while not applicable, suggest the setting of the case in the home county of the assigned judge unless the litigants secure his costs and expenses.

JUVENILE COURT

April 4, 1952—052-115.

ARRESTS—JAILS—CHILDREN CUSTODY

QUESTIONS: 1. Is taking a child into custody and depriv-

ing him of his liberty considered as arrest and forbidden by Ch. 26880, Acts of 1951 (Ch. 39, F. S.) ?

2. When it is necessary to take a child into custody, may such child be held in the City Jail for a reasonable time waiting for the arrival of the proper officer to take him to the designated place of detention, or is an order of the court necessary to so confine the child?

To: Honorable G. Bowden Hunt, Juvenile Judge, Polk County, Bartow, Florida:

In reply to your first question, §39.03 (6), F. S., provides that the "taking of a child into custody *shall in no case be termed an arrest.*" However, I feel that this section should not be interpreted by law enforcement officers as a prohibition from taking a child into custody for any reason without a specific order from the judge of the Juvenile Court. Subsection (1) of said section, provides that no child shall be taken into custody without an order of the judge of the juvenile court of the county or district wherein the child is found, living, or domiciled, *unless* (a.) the child is in such condition or surroundings that the welfare of the child requires that the child be immediately taken into custody, or (b.) the child shall be alleged to have committed a violation of law. *In case either of those circumstances shall exist, any law enforcement officer whose duty it would be to do so if the child were an adult, and any counselor or assistant counselor, may take the child into custody without order of the judge.* (Emphasis supplied).

I share your opinion in the belief that it was the intent of the Legislature to avoid the language usually associated with criminal prosecution, and in inserting the sentence "The taking of a child into custody shall in no case be *termed* an arrest," the intent of the act in the child's record should not show any arrest. Therefore, this act places no prohibition on the law enforcement duties of police officers—they have as much authority in the taking of a child into custody as they ever had in the past, except that this action shall no longer be *termed* an arrest, and that an order of the court is necessary except as set forth above.

In reply to your second question, §39.03 (3), F. S., provides that the child *shall not under any circumstances* be placed in any police or other vehicle, which at the same time contains an adult under arrest, nor in a jail, police station, or other place of detention, *except on general or special order of the judge.* (Emphasis supplied).

It is my opinion that an order of the court is necessary before a child can be confined in a city jail.

July 2, 1951—051-191.

JURISDICTION—CHILDREN—EMERGENCY PROTECTION—ESCAMBIA COUNTY

QUESTIONS: 1. Does the Juvenile Court have jurisdiction to make a temporary protective order awarding a child to a children's home society, when a chancery court has already assumed

jurisdiction of the child due to a pending divorce case wherein the custody of the child is raised?

2. In case of an emergency such as the child's life being threatened or its welfare endangered, and the same circumstances as set forth in question 1 exist, what is the jurisdiction and responsibility of the Juvenile Court?

To: Honorable Harvey E. Page, County Judge, Escambia County, Pensacola, Florida:

It appears that both the Chancery Court and the Juvenile Court have jurisdiction over the child in so far as protecting the child and providing for its welfare. However, as a matter of comity, the subsequent court should not interfere once the prior court has taken jurisdiction. Furthermore, the Chancery Court can act just as quickly as the Juvenile Court, and does not have to wait for a final hearing to enter the order necessary to protect the child, whose custody it has been called upon to determine.

In further answering your first question, I would like to point out that I think it is more of a practical matter to be worked out between the Juvenile and Chancery Judges. It is suggested that you confer with the chancery judge over there and try to work out some method for handling matters of this kind.

In answer to your second question, it is my opinion that it is the duty and responsibility of the Juvenile Court to do what is best for the safety and welfare of the child, therefore in cases of emergency such as you outline, I think it is within the jurisdiction of the Juvenile Court to enter such orders as are necessary to protect the child even though said order may be vacated by the Chancery Court in disposing of the question of custody of the child.

June 26, 1952—052-200.

JUDGE—JURISDICTION WAIVED—REINSTATEMENT

QUESTION: Where the Juvenile Court, on proper petition presented pursuant to §39.02 (6), F.S., Ch. 26880, Laws of 1951, waives jurisdiction of a manslaughter case involving a fifteen year old boy and certifies such case to the Criminal Court of Record or other court which would have jurisdiction of such offense if there were no Juvenile Court, may the prosecuting attorney of such court return such cause to the Juvenile Court?

To: Honorable Mattie H. Farmer, Judge, Orange County Juvenile Court, Orlando, Florida:

It will be noted from §39.02 (6), F.S., that the judge of the Juvenile Court has the authority, upon his or her own initiative, to waive jurisdiction of a case involving a child of fourteen years of age or over and transfer it to the court which would have jurisdiction of the child and the offense if the child was an adult. Similarly, if the child so demands, prior to or at the commencement of the hearing before the court, the judge *shall* enter an order waiving jurisdiction and certifying the case to the court which would have jurisdiction of the child if the child were an adult. There-

after, the child is subject to the jurisdiction of the other court as if the child were an adult.

In either instance, if the jurisdiction of the Juvenile Court is waived, either on initiative of the juvenile judge or demand of the child, there is no provision of the statute whereby jurisdiction of the Juvenile Court may be reinvoked or reinstated. Nor is there any provision in the statute which permits or authorizes the prosecuting attorney of the court which would have jurisdiction of the offense, if the person involved were not a child, to return the cause to the jurisdiction of the Juvenile Court.

It should not be overlooked, however, that if some other court other than the Juvenile Court, assumes jurisdiction of a criminal case involving a child, within the meaning of the Juvenile Court Act, the case should immediately be transferred to the Juvenile Court, together with the custody of the child and all evidence, papers, documents and testimony, just as soon as it is discovered that the person involved is a child within the meaning of this act. When such case is so transferred, it may be re-transferred to the general court having jurisdiction of the crime charged in the manner provided by §39.02 (6), as outlined above.

The Juvenile Court Act does not provide any method by which the Juvenile Court may compel prosecution of the cause once the jurisdiction of the Juvenile Court has been properly waived in compliance with §39.02 (6), F. S.

September 4, 1951—051-301.

JUDGE—COUNSELOR—COMPENSATION— QUALIFICATIONS

QUESTIONS: 1. Is it within the authority of the Board of County Commissioners of Gilchrist County to pay the County Judge for serving as Juvenile Judge a salary of \$75.00 per month, when the 1951 Juvenile Court Law provides an annual salary of only \$360.00?

2. Is it mandatory that a Counselor be employed where the County Judge acts as Juvenile Judge?

3. Is it legal for the County Prosecuting Attorney to act as Counselor?

To: *Honorable William O. Clifton, County Attorney, Gilchrist County, Trenton, Florida:*

Section 39.18 (2) F.S., provides that the Board of County Commissioners may pay in twelve (12) equal monthly installments from the Juvenile Court Fund, such annual salaries to the Judge as shall not *exceed* the amount specified in the Act, which sets up the salary on a population basis. It appears that the Judge *may be paid less but not more* than is provided for in the Act. This answers your first question in the negative.

Replying to your second question, I wish to call your attention to my opinion No. 051-230, dated July 20, 1951, wherein I held that Ch. 26880, Laws of 1951, was mandatory and not permissive legis-

lation. (Copy of opinion enclosed.) The Act does not exempt the county from employing a Counselor because of the fact that the County Judge serves as Juvenile Judge. However, §39.16 (1), which sets up the qualifications, selections, etc., of the Counselor, provides that the Counselor of a Juvenile Court presided over by the County Judge shall have as nearly as possible, qualifications equivalent to those provided for a Counselor of a separate Juvenile Court. Your second question is answered in the affirmative.

In reply to your third question, I know of no legal reason why the County Prosecuting Attorney could not be employed as Counselor of the Juvenile Court, provided he meets the qualifications required in §39.16, F.S.

October 5, 1951—051-350.

COUNTY JUDGE—JUVENILE JUDGE—COMPENSATION

QUESTIONS: 1. In figuring my excess fees and net income as County Judge, do I include the compensation I receive as Juvenile Judge or is that compensation to be considered in addition to what the law allows me to receive as County Judge?

2. What discretion do the County Commissioners have to determine that my compensation as Juvenile Judge shall be combined with my income as County Judge and that the two combined shall constitute the income allowed me as County Judge?

To: Honorable Archie M. Odom, County Judge, Fort Myers, Florida:

Section 39.18 (5) provides that in counties where the County Judge is Juvenile Court Judge, the salary of the Juvenile Court Judge may be paid to the Judge in addition to the compensation received in the capacity of County Judge. Section 39.18 (7) provides that no County Judge acting as Juvenile Court Judge shall be paid, as salary for services as Juvenile Court Judge an annual sum which together with the compensation for services as County Judge, will not exceed the annual salary paid to the Circuit Judge drawing the largest annual salary in the judicial circuit in which the County Judge is acting as Juvenile Court Judge.

In view of the foregoing, it is my opinion that it is the law and the intent of the Legislature that the County Judge who is also Judge of the Juvenile Court, shall receive such compensation as may be paid him by the County Commissioners for his services as Juvenile Court Judge and that said compensation shall be in addition to any salary and fees allowed him as County Judge. In other words, the County Judge, who also serves as Juvenile Judge is entitled to receive the compensation already allowed him as County Judge plus the compensation paid him as Juvenile Judge, so long as the two do not exceed the annual salary paid to the highest paid Circuit Judge in his circuit. The amount paid such Circuit Judge constitutes a ceiling on the compensation to be paid the County Judge who is also judge of the Juvenile Court. Your first question is answered in the negative.

In answer to your second question, the ceiling on your compensation to be received as County Judge is set by law. The fact that you are to receive compensation as Juvenile Judge in addition to

compensation received as County Judge up to the amount stated above is also a matter determined by the Legislature. Therefore, it is not a matter to be determined by the County Commissioners, however, it is within the discretion of the County Commissioners to determine what compensation, not to exceed the maximum ceiling provided in §39.18, shall be paid the Juvenile Court Judge and to provide for the payment thereof. This answers your second question.

October 24, 1951—051-381.

COUNSELOR—APPOINTMENT

QUESTION: Is the appointment of a Counselor solely within the discretion of the County Judge, who serves as Juvenile Judge, or must the Counselor and Assistant Counselor be selected from a list of three applicants submitted by the Juvenile Court Merit Board to the County Judge?

To: Honorable S. E. Sparks, Chairman, Juvenile Court Merit Board, Bradford County, Starke, Florida:

Section 39.16 (2) provides:

"The counselor shall be selected and appointed by the judge and each assistant counselor shall be selected and appointed by the counselor with the approval of the judge, in each instance from a list of not less than three applicants for the position to be filled."

The section further provides that should the Juvenile Court Merit Board fail to submit a list of at least three qualified applicants within two weeks after being requested to do so, any person meeting the qualifications prescribed in §39.16 (1) may be appointed.

It is my opinion that the appointment of a Counselor shall be solely within the discretion of the County Judge, who serves as Juvenile Judge, only when the Juvenile Court Merit Board shall fail to submit a list of at least three qualified applicants within the time prescribed by law. Upon such failure of the Board, the Judge may select and appoint a Counselor. If the list is submitted by the Board the Judge may exercise his discretion in appointing a Counselor from the list of applicants so submitted.

The Assistant Counselor shall be selected and appointed by the Counselor (with approval of the Judge) from the list of applicants submitted by the Juvenile Court Merit Board. Upon failure of the Board to submit a qualified list of applicants the Counselor, subject to the approval of the Judge, may select any person to be appointed Assistant Counselor who meets the legal qualifications.

July 20, 1951—051-230.

JUVENILE COURT ACT 1951—JACKSON COUNTY

QUESTIONS: 1. Is Ch. 26880, Laws of 1951, commonly known as the Juvenile Court Act of 1951, mandatory or permissive legislation, or, more specifically, must Jackson county comply with the provisions of said act?

2. If the answer to the first question is in the affirmative, what personnel will be required and at what salaries in so far as Jackson county is concerned?

To: Honorable Hugh Dukes, State Representative, Jackson County, Cottondale, Florida:

In determining whether or not a particular statute is directory (i.e., permissive) or mandatory, there is no set rule which can be applied in all circumstances. Generally, in the determination of this question the primary object is to "ascertain the legislative intention as disclosed by the terms of the statute, in relation to the scope, history, context, provisions and subject matter of the legislation, the spirit or nature of the act, the evil intended to be remedied, and the general object sought to be accomplished." (50 Am. Jur., p. 47.)

To apply the tests set down by the above quoted rule of statutory construction, it is necessary to analyze the act in its entirety. In so doing, we find that Ch. 26880 is a comprehensive statewide law on the subject of juvenile courts, comprising, in pamphlet form, 27 pages of printed material. The law, which, when included in the statutes will comprise Ch. 39, F.S., defines juvenile courts and other terms, establishes their jurisdiction, powers and the procedures to be followed, provides for investigations, sets the rules governing petitions, process and service, examinations, hearings, records and appellate proceedings, provides for the qualifications, selection, terms of office, duties and compensation of officers and other personnel of the court, and generally covers the subject of juvenile courts in great detail. The act, in §3 thereof, specifically repeals all of the present Ch. 415, F.S., relative to dependent and delinquent children, except §§415.02, 415.18 and 415.31, and repeals all other general acts relating only to juvenile courts, as well as all special acts dealing with juvenile courts with the exception of particular provisions of certain special acts relating only to specified counties, and those provisions of other special acts fixing salaries or providing for expenses of the operation of juvenile courts.

Hence, it appears that the 1951 law, as disclosed by the plain terms of the statute, was obviously intended to, and does, supersede and repeal all provisions of law relating to juvenile courts, other than those specifically excepted therein, and, in effect, writes a complete new chapter into the laws of Florida on this subject. It is important to note that in so repealing all these prior laws, the 1951 acts specifically provide that such is done to the end that "the law relating to juvenile courts shall be uniform throughout the state," and that "the purpose of this chapter is to protect society more efficiently . . . which will conduce to the child's welfare and the best interests of the state."

A reading of this comprehensive statute and an analysis of its scope, context, subject matter and provisions seem to indicate clearly that it was the intention of the legislature to provide a statewide uniform method of adjudicating juvenile cases and to coordinate the handling of such cases into one fixed procedure throughout the state, in so far as possible, thus eliminating the various non-uniform methods heretofore in effect. Nowhere in the act is there any indication that it was intended to be permissive or optional with the

various counties, but to the contrary, it appears to have been intended to be effective in all counties throughout the state.

The definitions, scope, nature and purposes of the law are so broad, in my opinion, as to deny any presumption that the act is not mandatory; as indicated above, the statute repeals all other material legislation on the subject of juvenile courts, so that unless a county operated under the provisions set forth therein, there would be nothing in the statute books under which a court could proceed to handle juvenile cases. The juvenile courts, as defined in this act, have "exclusive jurisdiction" of dependent and delinquent children; hence, only a court operating under the provisions of this new law would have jurisdiction to adjudicate such cases.

It is my opinion that Ch. 26880 provides an exclusive method for handling juvenile cases, and that the act is mandatory upon all counties other than those specifically excepted in the context of the act. The answer to your first question, then, seems to be that Jackson county must comply with the provisions of the act.

Turning to your second question, a reading of the act indicates that the basic personnel required under the law includes the judge and a counselor plus whatever other personnel may be required in the light of the needs of the county. Since it is my understanding that no separate juvenile court is presently established in Jackson county, the term "juvenile court" as defined in the act would include the county judge's court in Jackson county, and the county judge would act as the juvenile judge. Since, in addition to the judge, a counselor seems to be required in order to carry out the clear intent and purposes of the act, it would be incumbent upon the county to provide for and the judge to appoint a counselor in the manner provided therein.

In addition, dependent upon the local needs of the county, it may be necessary to employ assistant counselors and other personnel within the limits of the juvenile court fund to be established pursuant to §39.18 (9).

As to the salaries to be paid, a schedule of salaries for the judge and counselor is contained in §39.18, wherein it is provided that the board of county commissioners of each county may fix such annual salaries for the judge and counselor as shall not exceed the amounts specified in that section. Applying the formula contained in the act to the population of Jackson county, it would appear that the county judge of Jackson county, for his services as juvenile court judge, may be paid a maximum of \$3,800 per annum in addition to his salary as county judge, so long as his total compensation does not exceed the annual salary paid to the circuit judge drawing the largest annual salary in that judicial circuit. The counselor, as provided in the act, may be paid a salary equal to two-thirds of the salary specified as permissible to be paid to the judge. However, as indicated by the law, these figures are merely maximum salaries which may be paid, and the board of county commissioners has the authority under this statute to fix the salaries at any rate not in excess of these figures.

In so far as the number and salary of assistant counselors, and the number, salaries, titles and duties of other employees, are con-

cerned, they shall, according to the law, be designated by the counselor with the approval of the judge, or by the judge in the case of those employees whose duties are performed directly under the supervision of the judge, within the limits of the juvenile court fund.

Expenses for the operation of the juvenile court, which includes salaries and travel expenses of juvenile court personnel, ordinary office expenses of the juvenile court, and other items of expense provided in the law to be paid out of the juvenile court fund, are to be appropriated by the board of county commissioners either from the general fund, or another fund of the county as the board may choose, not exceeding a sum equal to 25 cents for each person in the county, and the board of county commissioners is authorized by the law to levy taxes necessary to raise the money so appropriated for the fiscal year commencing October 1, 1951, and for each subsequent fiscal year. These observations seem to answer your second question.

December 18, 1951—051-465.

JUVENILE COURT ACT—ENFORCEMENT EXPENSES— COUNTY JUDGE—COUNSELOR

QUESTION: Where the Board of County Commissioners of Alachua County failed, neglected and refused to appropriate and include funds in their budget and, also, failed to take any action whatsoever in regards to the furnishing of a Juvenile Court seal and necessary record books and forms for the use of the Juvenile Court, can I, out of the fees of my office as County Judge of Alachua County, pay attorneys' fees for advice, counsel and litigation respecting the question of my duties and responsibilities under the Juvenile Court Act?

To: Honorable H. H. McDonald, County Judge, Alachua County, Gainesville, Florida:

On July 20, 1951, I rendered an opinion (051-230) to the effect that Ch. 26880, Laws of 1951, repeals all other material legislation on the subject of juvenile courts, so that unless a county operated under the provisions set forth therein, there would be nothing in the statutes under which a court could proceed to handle juvenile cases. The juvenile courts, as defined in this act, have "exclusive jurisdiction" of dependent and delinquent children; hence, only a court operating under the provisions of this new law would have jurisdiction to adjudicate such cases. In said opinion I held that said Chapter provides an exclusive method for handling juvenile cases, and that the act is mandatory upon all counties other than those specifically excepted in the context of the act.

In view of the fact that Ch. 26880 mandatorily charges you, as County Judge of Alachua County, with the duty and responsibility of operating the Juvenile Court in that county, it is my opinion that you must necessarily have the right to expend funds of your office as such County Judge, to employ legal counsel and pay other necessary legal expenses connected with the proper judicial determination and enforcement of your duties as a County Judge under this chapter. Otherwise, you would be in the position and under the legal responsibility of the law, as County Judge of Alachua County, to operate the Juvenile Court in that county without

funds, and without funds to determine your responsibility under the circumstances enumerated in your letter of above date, and without funds to seek relief from any of the obligations of your oath of office or any of the duties imposed upon you by the Constitution and Statute Law of this State.

It seems to me that this opinion is supported, in principles at least, by the opinions of certain of my predecessors in office. See opinion dated April 14, 1930, found on Pages 316 and 317 of the Attorney General's Report for 1929-1930, and opinion dated February 7, 1935, found on page 220 of the Attorney General's Report for 1935-1936. Also see the cases of *Bloxham v. Consumers' Electric Light and Street Railroad Co.*, 36 Fla. 519, 18 So. 444, and *State ex rel. Himes v. Culbreath*, 128 Fla. 210, 174 So. 422.

It necessarily follows, that your question must be answered in the affirmative.

November 17, 1952—052-315.

COUNSELOR—DELINQUENTS— DRIVER'S LICENSES—RESTRICTION

QUESTION: Is the Counselor of the Juvenile Court, under Ch. 39, F. S., violating the law whenever he restricts and holds in his possession the driving permit of a delinquent coming before him?

To: Honorable John R. Wood, Juvenile Counselor, Sarasota, Florida:

Chapter 322, F. S., generally provides for the issuance, suspension and revocation of drivers' licenses or permits and the lawful procedure therefor. In AGO No. 049-464, I said in pertinent part that "in no case can the holder of a legal driver's license be deprived thereof, *until he is convicted of an offense for the commission of which the statute imposes the penalty of suspension or revocation.*" (Emphasis supplied)

Section 39.10, F. S., specifically provides in pertinent part:

"(3) An adjudication by a juvenile court that a child is a dependent or delinquent child shall not be deemed a conviction, nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication, nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction, nor to disqualify or prejudice the child in any civil service application or appointment." (Emphasis supplied)

I am unable to find any provision in Ch. 39, F. S., which might be construed to authorize a counselor of the juvenile court to restrict and hold in his possession the driving permit of a delinquent coming before him.

Your question is accordingly answered in the affirmative.

This conclusion does not mean, however, that a juvenile counselor should not cooperate with the department of public safety in initiating a revocation or suspension of the driver's license of a delinquent child in accordance with the procedure and provisions of Ch. 322, F. S., when he thinks such action is appropriate.

JURORS AND JURY LISTS

June 4, 1951—051-144.

QUALIFICATION REQUIREMENTS

QUESTION: Were jury lists existing on the effective date of Ch. 26514, Laws of 1951, which added the requirement that to be qualified, jurors shall be duly qualified electors of their respective counties, vitiated by such additional requirements so that a new jury list must be selected?

To: Hon. L. L. Parks, Circuit Judge, County Courthouse, Tampa, Florida:

Section 40.01, F. S., prior to the enactment of said Ch. 26514, Laws of 1951, fixed the qualifications of jurors in this state. The jury lists existing on the effective date of this enactment were duly selected pursuant to it and were valid jury lists when said Ch. 26514 became effective. The only change made in the qualification requirements of jurors in this state, by said enactment, was to add the additional requirement that jurors thereafter should also be "duly qualified electors of their respective counties." Any persons whose names were included in the existing jury lists, who are not "duly qualified electors of their respective counties," may easily be eliminated on voir dire examination by the court and in the same manner as would any other person who might be disqualified to act as a juror.

Where any person selected for jury duty and placed on the jury list is ascertained to be disqualified or incompetent to serve as a juror, "such disqualification shall not effect the legality of such jury list or be cause of challenge to the array . . . but such person . . . shall be subject to challenge for cause." (§40.02, F. S.). "A challenge to the array or motion to quash the panel or the venire of jurors, goes to the illegalities in selecting the names of persons for jury service . . . not to the qualifications of individual members of a panel or venire." (*Chance v. State*, 115 Fla. 379, 155 So. 663). A challenge of a jury panel does not go to the disqualifications of the individuals on the panel (*Presley v. State*, 61 Fla. 46, 54 So. 367).

As a general rule errors and irregularities in failing strictly to comply with the statutes in making up a jury list do not invalidate the list unless they result in prejudice to the parties or prevent the securing of a fair and impartial trial (50 C. J. S. 889, §163).

Under the statutes as amended by said Ch. 26514, Laws of 1951, should the jury commission, in selecting the jury list, include persons who are not registered voters such inclusion would not invalidate the jury list, unless such selection resulted in prejudice to the parties or prevents the securing of a fair and impartial trial. The inclusion of such disqualified persons would not affect the legality of the jury list (§40.02 (5), F.S.) and the remedy would be by challenge of the disqualified juror for cause. The jury lists selected prior to the enactment of said Ch. 26514 could not be held in a worse light than would subsequent selected lists containing disqualified persons. We feel, therefore, that the amend-

ment of §40.01, F. S., as amended by Ch. 26514, Laws of 1951, should be enforced by questions on voir dire or by challenge for cause and not by quashing the jury lists existing when said Ch. 26514 was enacted. This seems to answer the above question.

September 5, 1951—051-304.

COUNTY JUDGES' COURTS—JURORS—COMPENSATION

QUESTION: Does §40.24, F. S., as amended by Ch. 26868, Laws of 1951, which sets the pay of jurors in the courts of county judges at \$1.00 per day, repeal that portion of §41.08, F. S., which sets the compensation of jurors in county judges' courts at \$3.00 per day?

To: *Honorable Fred T. Bennett, County Judge, Washington County, Chipley, Florida:*

Section 40.24, as amended by Ch. 26868, Laws of 1951, specifies that the compensation of grand and petit jurors in the circuit courts, criminal courts of record and county courts shall be \$5.00 per day, and then provides as follows:

"... jurors in the courts of county judges and justices of the peace, and jurors summoned upon inquest of the dead, shall be paid one dollar per day for each day they serve on the jury ..."

Section 41.08, F. S., provides, in pertinent part, as follows:

"*Compensation of jurors.*—Each juror in the county judge's court of the several counties of this state, having no county court, criminal court or court of record, shall receive in all cases three dollars for each day's attendance or fractional part thereof ..."

As stated in your letter, Ch. 26868, Laws of 1951, specifically repeals all laws or parts of laws in conflict therewith, and, at first reading, it would appear that this 1951 act is in conflict with §41.08, F. S. However, when each is given the proper effect and construed in relation to the other, there is not necessarily any conflict between the two laws. A careful study of the two sections leads me to the conclusion that §41.08, prescribing compensation of \$3.00 per day for jurors in the county judge's court is applicable only to counties "having no county court, criminal court or court of record." On the other hand, §40.24 fixes the compensation at \$1.00 per day for jurors in the courts of county judges in counties that do have a county court, criminal court or court of record.

Accordingly, then, the pay of jurors in the county judge's court of a county having no county court, criminal court or court of record is fixed at \$3.00 per day by §41.08, and this section is not repealed by §40.24, F. S., which fixes the pay of jurors in the county judge's court at \$1.00 per day, only in those counties where there is a county court, criminal court or court of record. Your question is therefore answered in the negative.

This opinion is in accord with a prior opinion rendered by my predecessor on October 2, 1945 (see Biennial Report 1945-1946, page 150), on substantially the same question, a copy of which is enclosed.

SMALL CLAIMS COURTS

January 21, 1952—052-13.

TITLE "ULTIMATUM"—USE BY INDIVIDUAL—JEFFERSON COUNTY

QUESTION: May a private individual, company or corporation use the title of the Small Claims Court of Jefferson County, Florida, in the heading of a notice styled "Ultimatum Final Notice Before Suit" without thereby transgressing upon the authority of said court to enjoy the exclusive use of said title?

To: Honorable Prentice P. Pruitt, Judge, Small Claims Court, Jefferson County, Monticello, Florida:

While I am unable to discover any provision in the Florida law which would specifically prohibit the use of the title of your court in the manner mentioned, a search of the general law reveals that similar practices have been condemned in other states. This is evidenced by at least two instances in which an attorney was suspended from practice for using a collection notice to debtors, simulating legal process. (See *Re Dowes*, 168 Minn. 6, 209 N.W. 627, 47 ALR 265, and *In re Swihart et al*, 42 S.D. 628, 177 N. W. 364). In both cases the notice was similar in nature to the form in the instant problem.

In New York the delivering of a paper simulating legal process is made a misdemeanor by statute. A conviction based upon this statute was affirmed in *People v. Globe Jewelers, Inc., et al*, 249 App. Div. 122, 291 N.Y.S. 362, for sending a collection notice similar to a summons.

In *Quina v. Roberts et al*, 16 So. 2d. 558, arising in Louisiana, it was held that a creditor's letter to the debtor's employer requesting assistance in collecting a debt of \$1.45 and enclosing a "Final Notice Before Suit" which misled the employer into believing that it was issued out of some official or legal channel, for the purpose of coercing payment, constituted a tort entitling the debtor to redress, notwithstanding he was unable to prove special damage and regardless of whether the publication was libelous. The damage, it was said, will be allowed for mental anguish suffered a debtor in cases where the creditor has pursued unreasonable methods in attempting to make collection of his claim.

Thus it appears that the method of collection used in the instant problem has been regarded as highly unethical, actionable as a tort in some cases, and criminal in at least one state.

It is therefore my opinion that while there is no specific statutory law in this state which seems to be applicable, the practice is to be censured, and the use of such persuasive powers as are at your disposal to discourage the practice is to be highly recommended; failing in this, an appropriate action in the courts to obtain legal injunction against such practice might well be successful.

June 2, 1952—052-173.

JUDGES—CERTIFIED COPIES OF JUDGMENTS—FEES

QUESTIONS: 1. May judges of small claims courts existing under Ch. 42, F.S., in addition to the flat fees provided in §42.11,

F.S., charge additional fees for the issuance of executions and for certified copies of judgments of the court?

2. If the first question is answered in the affirmative, what fees may be charged for said services?

3. Are the provisions of Ch. 145, F.S., applicable to judges of small claims courts existing under Ch. 42, F.S.?

To: Honorable Bryan Willis, State Auditor:

It is a general rule that "public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous." (Rawls v. State, 98 Fla. 103, 122 So. 222). It is provided, by §42.17 (2), F.S., that "upon judgment being entered in any cause execution shall thereupon be issued" for the enforcement thereof. The execution of a court is its process for enforcing its judgment. The small claims court has no other process to which it may resort for the collection of its judgments. We, therefore, feel that the issuance of the execution is a part of the proceeding and included within the flat fees provided by §42.11, F.S.

Section 42.17 (1), F.S., provides for the filing of transcripts of judgments, entered by small claims courts, with the clerk of the circuit courts of the several counties and the recording thereof, for the purpose of fixing the lien of the judgment on the real estate of the judgment debtor. Such transcripts of record and their record have not usually been considered as being within the flat fee statutes for circuit, county, civil court of record, and other courts. The proceeding in the small claims court is complete with the entry of the judgment and the issuance of the execution thereon. It is not necessary to the enforcement of the judgment that a certified copy thereof be recorded with the clerk of the circuit court; its only effect is the creation of a lien in addition to the lien of the execution on real estate. The judgment creditor is given the right of creating a lien upon the real estate of the judgment debtor by the filing and recording of the certified copy. We, therefore, do not think that the certified copy and its record in the clerk of the circuit court's office is a part of the proceeding in the small claims court covered by the flat fees provided by §42.11, F.S.

Although §42.11, F.S., provides a flat fee for court costs in small claims courts established under Ch. 42, F.S., it further provides that "the award of other court costs shall be according to the discretion of the judge who may include therein reasonable costs of bonds and undertakings, and other reasonable court costs incidental to the suit incurred by either party." In §42.08, F.S., it is provided that the docket book may contain "a marginal memorandum of the items of all costs, including witness' fees." In §42.10, F.S., sheriff's costs in connection with suits in the small claims court are allowable as costs in addition to the filing fee. There is no provision in the statutes either for or against fees for certified copies of judgments of small claims courts under said Ch. 42. Many statutes provide fees in the same amounts as are provided for the clerks of the circuit courts, for example, criminal courts of record (§32.12, F.S.), civil

courts of record (§33.10, F.S.), County courts (§34.04, F.S.), county judges courts (§36.17, F.S.), justice of the peace (§37.08, F.S.). If there may be a charge for certified copies, there being no fees provided therefor in Ch. 42, F.S., those provided for clerks of the circuit court might be followed by implication.

Fees collected by officers represent the charges which the state makes for services rendered by it through its officers, and constitute a fund subject to the control of the State and to be applied as the Legislature directs (67 C. J. S. 327, §90). "The general principle prohibiting public officers from charging fees for the performance of their official duties does not prohibit them from charging for their services for acts they are under no obligation, under the law, to perform" (67 C. J. S. 328, §90). There is nothing in Ch. 42 requiring the judge or clerk of small claims courts to give certified copies, the right to use such copies comes from the provision for filing them with the clerk of the circuit court. Doubtless the Legislature intended to permit the judge or clerk of the small claims courts to issue certified copies of its judgments, not only to litigants but to the public; and such services, not being services to the public as in *Rawls v. State*, supra, it is doubted that the Legislature ever intended that such services be free to the public. We are, therefore, of the opinion that the judge or clerk of the small claims court may charge for certified copies of its records at the rate provided for similar services by clerks of the circuit court.

These observations seem to answer the first and second questions above stated.

We feel that Ch. 145, F.S., is applicable to judges of small claims courts, under Ch. 42, F.S., except insofar as provisions in said Ch. 42 may conflict therewith. This answers the third question above.

November 27, 1951—051-429.

OFFICE SPACE—JUDGE—RECORDS

QUESTIONS: 1. Does §4, Art. 16 of the State Constitution require that the judge of the small claims court have an office in the courthouse and that the records of the court be kept in that office?

2. May the small claims court sit with or without a jury and render final judgment in the trial at two or more cities within the county other than the county seat?

To: *Honorable Virgil B. Conkling, Judge, Small Claims Court, Brevard County, Titusville, Florida:*

Section 20 of Ch. 26920, Laws of 1951, which provides for the activation of a small claims court in each county and under which chapter your court operates, provides in part: "The board of county commissioners shall furnish within a reasonable time after the activation of the small claims court suitable quarters to house such court . . ." Art. 16, §4, of the State Constitution provides: "All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties; . . ."

When said §20 is read with the above constitutional provision, it appears that the legislature did not intend that the location of the court be limited to the courthouse. However, in a recent opinion, copy of which is attached, we held that there is no reason why small claims courts should not be permitted to use the court room of the county when such room is available. In *Beville v. State* (Fla.) 55 So. 854, the court held that "The particular building at or in the county town in which the court is held does not enter into the court's proceedings as a factor as to their validity, . . ." It is my opinion that the court does not necessarily have to be held in the courthouse nor does the judge's office have to be located therein. It follows therefore that the records of such court should be kept in the judge's office wherever it may be located within the county seat.

The supreme court of our state held in *Mack v. Carter* (Fla.) 183 So. 478, that a local act providing for terms of the circuit court for the trial of certain civil cases in a city other than the county seat, was repugnant to the constitutional provisions relating to the removal of county seats and keeping of the official books and records, in that such procedure would make for a "disorderly administration of justice, it would create confusion and uncertainty and is contrary to the complete orderly system set up in the constitution for the administration of justice." It is my opinion that the reasoning and principles set out in this case applies to small claims courts; hence, your second question is answered in the negative.

December 21, 1951—051-477.

JUDGE—CONTEMPTS—POWER TO PUNISH

QUESTIONS: 1. Does the small claims court, created by Ch. 26787, Acts of 1951, have authority to cite for criminal and constructive contempt?

2. If question 1 is answered in the affirmative, what officer shall act as executive officer of this court?

To: *Honorable Edward L. Bush, Judge, Small Claims Court, Putnam County, Palatka, Florida:*

The principle is well established in Florida that courts and judges have an inherent power to punish a contempt irrespective of statutory authority.

In *Ex Parte Earman*, 95 So. 755, 31 ALR 1226, the court in recognizing the above principle stated as follows:

"Respect for courts and judicial officers in the performance of their judicial functions, or in matters that are incident to administering right and justice, naturally arises in the human mind from an appreciation of the delicacy and importance of the power exercised by courts and judges, and by the becoming manner in which the functions are performed by those intrusted with the power.

"But, as all persons do not at all times appreciate or recognize their obligations of respect for the tribunals that are established by governmental authority, to maintain right and justice in the various relations of human life, the

courts and judges have, under constitutional government, inherent power by due course of law to appropriately punish, by fine or imprisonment or otherwise, any conduct that in law constitutes an offense against the authority and dignity of a court or judicial officer in the performance of judicial functions. And appropriate punishment may be imposed by the court or judge whose authority or dignity has been unlawfully assailed. See *Re Hayes*, 72 Fla. 558, L.R.A. 1917 D., 192, 73 So. 362, Ann. Cas. 1918B, 936."

This principle has been recognized by the legislature by the enactment of §38.22, F.S., which provides as follows:

"POWER TO PUNISH. *Every court* may punish contempts against it, whether such contempts be direct, indirect or constructive, and in any such proceeding the court shall proceed to hear and determine all questions of law and fact, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine, or twenty-four hours' imprisonment." (emphasis supplied).

Chapter 26787, Acts of 1951, bestows no authority upon the small claims court created therein to punish for contempt. It is apparent, however, from the above principles that the power to punish for contempt is inherent in every court, even without statutory authority. It follows that the small claims court has an inherent power to cite for contempt. Still further, §38.22, F.S., in recognizing the inherent power specifically provides: "Every court" may punish contempts against it.

If then, the small claims court has the power to punish for contempt, it would seem to follow that criminal and constructive contempt are included in this power. Although it is true that the small claims court has no criminal jurisdiction and is exclusively a civil court, I think it might properly punish a criminal contempt. The statute (§38.22) makes no distinction between criminal and civil contempt, but is inclusive. No Florida cases were found dealing with the point; however, in a number of jurisdictions, it has been held that a civil court, though without criminal jurisdiction, has the power to punish for criminal contempt, upon the theory that a proceeding for criminal contempt is not a criminal prosecution.

In the light of the foregoing, it is my conclusion that question one is properly answered in the affirmative.

As to your second question, I find nothing in the law, statutory or otherwise, which would appear to specifically authorize or prohibit the sheriff of Putnam county from acting as executive officer for the small claims court established therein. Chapter 26787, Laws of 1951, under which the small claims court operates, contains no reference to an executive officer for the court, although other similar acts providing for small claims courts have generally designated the county sheriff as such executive officer.

Since it is basic that a court in order to properly exercise its functions must have an executive officer, even though not specifically provided for in the statute, it is my opinion that, based on the fact that the sheriff is generally designated as the executive officer

for other courts, he would be the proper person to act as executive officer in the instant case. Since, as indicated above, there is nothing in our law which would prohibit the sheriff from acting in such capacity, I can see no objection to his performing such function for the small claims court of Putnam county.

In the absence of specific statutory authority, it would appear that the county sheriff would be the proper person to serve as executive officer for your court.

December 8, 1952—052-324.

SMALL CLAIMS COURTS—JUDGE'S BOND

QUESTION: Where a Judge of a Small Claims Court holds office under Ch. 42, F.S., what bond, if any, is required of him, to qualify for that office?

To: *Honorable Robert Andreu, Jr., Judge, Small Claims Court, St. Augustine, Florida:*

Article 8, §7, of the Florida Constitution in part provides as follows:

"All county officers, except Assistant Assessors of Taxes, shall, before entering upon the duties of their respective offices, be commissioned by the Governor; but no such commission shall issue to any such officer, until he shall have filed with the Secretary of State a good and sufficient bond, in such sum and upon such conditions, as the Legislature shall by law prescribe, approved by the County Commissioners of the county in which such officer resides, and by the Comptroller."

A careful reading of Ch. 42, F.S., fails to reveal any requirement that a bond be given by the Judge of the Small Claims Court. Section 137.01, F.S., provides "Each of the county officers of whom a bond is or shall be required by law, shall, before he is commissioned, give bond . . ." conditioned for the faithful performance of the duties of his office.

Examples of county officers required to give bond are: Clerks of the Circuit Court, §§28.01, 28.02; County Judges, §36.03; Sheriffs, §§30.01, 30.02 and Justices of the Peace, §§37.10, 37.11, F.S.

The Supreme Court of Florida, in *State ex rel Lewis vs. Garrett, et al.*, 130 Fla. 413, 178 So. 309, referring to Article 8, Section 7 of the Florida Constitution, said at page 311 as follows:

"We do not construe the terms of the Constitution as thus quoted in so far as it requires a bond to be mandatory, but we think the question of whether a county officer shall be required to give a bond, together with the amount and conditions thereof, is one in the discretion of the Legislature to determine. If the office is not one that requires a bond, the Legislature may remit it."

Therefore, in my opinion there is no bond required of a Judge of the Small Claims Court, holding office under Ch. 42, F.S.

December 31, 1952—052-340.

SMALL CLAIMS COURTS—JUROR'S COMPENSATION— SHERIFF'S FEES

QUESTIONS: 1. Where would prospective jurors be drawn from for jury service in the small claims courts of Duval County?

2. What would be the pay per day for such jury duty?

3. How would sheriff's fees plus mileage be determined to be assessed against the person demanding the jury trial in advance of such trial?

4. Against whom would the cost of payment of the juror's and sheriff's fees be assessed in a small claims action?

To: Honorable H. E. Belflower, Judge, Small Claims Court, Duval County, Jacksonville, Florida:

Chapter 25489, Laws of 1949, establishing a small claims court in Duval County, and Ch. 26920, Laws of 1951, which provide for the establishment of small claims courts in other counties of the state merely state that a jury trial can be obtained upon either the demand of the plaintiff or the defendant. Neither of these laws provide for any special method for the selection of jurors when a jury trial is so demanded in a small claims court action. The provisions establishing a Jury Commission in Duval County are found in §§40.09-40.43, F.S. The provisions of §40.38 indicate that jurors are to be drawn from the jury box for use only in a court of record. We doubt that the small claims court is a court of record and until such time as the legislature by enactment, determines it to be a court of record, or a court of competent jurisdiction, we feel that the small claims court should be treated as though it is not a court of record. Since there is no provision in Ch. 25489 for the selection of a jury in a small claims court action, it is therefore my opinion that the sheriff of Duval County, who is executive officer of the court, as provided by §3, should select the jury in the manner he would select a jury for a justice of the peace action, as provided by §81.08, F.S.

Section 1, Ch. 25489, Laws of 1949, grants original jurisdiction to the small claims court of Duval County in cases at law, where the demand for/or the value of property does not exceed \$100.00. This provision of the law gives the small claims court concurrent civil jurisdiction with the county judge's court, (§36.01, F.S.) and the justice of the peace courts, (§37.01, F.S.) of Duval County. An opinion rendered by this office (051-304) stated that §40.24, F.S., fixes the compensation at a \$1.00 per day for jurors in courts of county judges in counties that do have a circuit court, criminal court of record or a county court. Under the provisions of §40.24, F.S., the pay of jurors in county judges court and the justice of the peace court in counties that have circuit courts, criminal courts of record, or a county court is limited to \$1.00 per day. Accordingly, the small claims court, having the same civil jurisdiction as the county judge's court and the justice of the peace court, and since, Duval County has a criminal court of record, a juror serving on a small claims jury should be limited to the compensation of \$1.00 per day for such jury service.

The sheriff's fees plus the mileage in summoning a jury will be determined by §34.24, F.S. Section 15, Ch. 25489, Laws of 1949, provides that you, as judge, may fix the reasonable sum to secure the payment of cost incurred by reason of a jury. The law requires a reasonable sum, not an exact sum. Therefore, you must in advance of granting a jury trial, determine the reasonable and approximate cost of a juror's pay and the sheriff's fees plus mileage, and require the persons so requesting the jury trial to deposit the same. However, this is not to be considered a determination of the constitutionality of §15, in the situation where the defendant demands a jury trial in a small claims court action and the defendant refuses or is unable to pay the sum required to secure the costs of a jury trial. See *State ex rel Jennings v. Peacock*, 171 So. 821.

Section 40.25, F.S., provides that the mileage and per diem of jurors summoned specially to try any issue of facts arising in a civil cause under the laws of this state, before any court or judge in vacation, shall be taxed as cost and paid by the party to the cause as other costs are paid. Section 5, Ch. 25489, Laws of 1949, makes no distinction between term and vacation time in the Small Claims Court of Duval County, as it provides that said court shall be in session continuously from day to day. Section 16, Ch. 25489, Laws of 1949, provides that upon judgment being entered in any cause, execution shall thereupon be issued against the party against whom the judgment is rendered for the amount of such judgment and cost. Therefore, in view of these statutory provisions it is my opinion that the juror's and sheriff's fees will follow the judgment and the person against whom the judgment is rendered will be responsible for the payment of such fees. Section 15 merely provides that the person so demanding the jury trial shall deposit the reasonable costs incurred by reason of the jury trial merely to secure payment of such fees.

CHAPTER VI

CIVIL PRACTICE AND PROCEDURE

LEGAL AND OFFICIAL ADVERTISEMENTS

February 20, 1952—052-47.

SHERIFFS—SALE OF PROPERTY—PROOF OF PUBLICATION

QUESTION: In holding sheriff's sale of property levied upon under judgment, is it legal to make such sale without having proof of publication in hand? If such sale is held just upon oral statement of publication, would this render the sale illegal?

To: Honorable Amos H. Hall, Sheriff, Broward County, Ft. Lauderdale, Florida:

I suggest that you study pages 168 and 169 of the Florida Sheriff's Manual for a discussion of the sheriff's duties when conducting sales. As stated in this Manual, "The proof of publication shall be furnished the sheriff and its form and contents are prescribed by law."

Chapter 49, F.S., provides the proper procedure for obtaining legal and official advertisements.

It is the duty of the sheriff to ascertain before conducting a sale that the law relating to advertisement has been complied with. Obviously, the safest course for him to follow would be to require a properly executed proof of publication to be delivered to him. If, however, he relied on an oral statement that publication had been properly obtained, the question of validity of the sale would depend upon whether or not such oral statement were true.

TRIAL PRACTICE AND PROCEDURE

October 16, 1951—051-363.

STATE TREASURER—COURT REGISTRY FUNDS— CLERKS—REMITTANCES—LIABILITY

QUESTIONS: Occasionally a Clerk of the Circuit Court will forward to the State Treasurer court registry funds, as contemplated by §54.04, F.S., in the form of checks drawn by individuals payable to the clerk and endorsed by such officer to the State Treasurer. There have been occasions when such a clerk would, in pursuance of §54.05, F.S., draw a draft for such funds even before the deposit of such funds reached the State Treasurer's office. In case the State Treasurer should pay a draft drawn against a deposit represented by a check or checks later returned unpaid for insufficient funds, or for any other reason,—

1. Would the State Treasurer be liable for the amount involved in the payment of such draft?

2. Should the State Treasurer make final collection on checks deposited in court registry funds before honoring any drafts drawn against same?

To: Honorable J. Edwin Larson, State Treasurer:

The above questions are answered as follows:

(1) This question is elaborated in the request for opinion as follows: "Is the State Treasurer within his legal rights in paying a properly drawn draft and assuming that the Clerk is responsible for the value of the check forwarded to this office representing the deposit of Court Registry Funds?" While a Clerk of the Circuit Court, under circumstances contemplated by this question, would be liable to the State Treasurer for the amount of such check or checks returned unpaid, the State Treasurer would be liable for the amount involved in the payment of any such draft.

(2) To avoid possible liability, the State Treasurer should make final collection on all checks representing court registry funds sent to him in pursuance of \$54.04 before honoring any draft drawn against funds represented by such checks under \$54.05.

JUDGMENTS AND EXECUTIONS

November 30, 1951—051-436.

SMALL CLAIMS COURT—EXECUTION OF JUDGMENT

QUESTION: Where a certified copy of a judgment obtained in the Small Claims Court of Putnam County, established by Ch. 26787, Laws of 1951, has been filed and recorded in the office of the clerk of the circuit court of St. Johns county, should execution on the judgment be issued by the clerk of the circuit court of St. Johns county or by the Small Claims Court of Putnam County?

To: Honorable Hiram Faver, Clerk of Circuit Court, St. Johns County, St. Augustine, Florida:

I think your question is substantially answered by my opinion 049-476, dated October 7, 1949, wherein I held that a small claims court has inherent authority to issue executions for the enforcement of the judgments of such court, even though the enactment creating the court does not specifically provide for the issuance thereof. A copy of this opinion is enclosed for your information.

As may be seen from this prior opinion, execution on a judgment is normally issued by the court rendering same. Since §13 of Ch. 26787, Laws of 1951, provides that judgments of the Small Claims Court of Putnam County shall become a lien on the defendant's real estate in any county from the time of filing in the office of the clerk of the circuit court in that county, but does not indicate that the clerk should issue execution, it seems to follow that the small claims court has the inherent authority to issue the execution, once the judgment is so recorded. This would be in accordance with the provisions of §§55.16 and 55.17, F.S., which confer authority on "all the courts of this state" to issue executions which "shall be of full force throughout the state." This general rule is sometimes modified, as in the case of §81.24 dealing with the execution of cer-

tain judgments rendered by justice of the peace courts, wherein the clerk of the circuit court is specifically charged with the duty of issuing executions. However, in the absence of such express modification of the general rule, the court itself would be the proper authority to issue executions for the enforcement of its judgments.

Execution on the judgment in the case you mention should be issued by the Small Claims Court of Putnam County rather than by you as clerk of the circuit court of St. Johns county. Your question is answered accordingly.

PROCEEDINGS SUPPLEMENTAL TO EMINENT DOMAIN

July 9, 1951—051-203.

DECLARATION OF TAKING—FINAL JUDGMENT— FEE TITLE—VESTING—INTERIM PERIOD

QUESTION: In condemnation proceedings by the State Road Department or other governmental agencies, where the condemning authority has filed its Declaration of Taking, where does the fee title to the property vest during the interim period between the filing of the Declaration of Taking and the final judgment on Declaration of Taking?

To: Honorable Harold S. Smith, County Attorney, Everglades, Florida:

Declarations of taking are supplemental proceedings in eminent domain and are governed entirely by statute. (§§74.01-74.15, F.S.) Declarations of taking are never independent suits but are used in conjunction with regular condemnation proceedings under Ch. 73, F.S.

This is a summary proceeding whereby the condemning authority acquires the title to the property and the right of possession prior to the time that the twelve man jury has assessed just compensation as required by the Constitution and statutes. It does not abrogate the necessity that a jury shall ultimately determine and assess compensation.

After the declaration is filed and seven days notice thereof has been given to the owner or owners, the judge sets a date for the appointment of appraisers, not to exceed three in number, whose duty it is to view and appraise the premises and report to the court. The court then sets a date not more than five days after the date of the order appointing the appraisers in which to consider the report of the appraisers and the testimony for the respective parties.

On the date set for the consideration of the report of the appraisers, the judge of the court enters "an order requiring the condemning authority to deposit in the registry of the court such sum of money as the court shall determine will fully secure and fully compensate the persons lawfully entitled to compensation as ultimately determined by final judgment of the court, which said deposit shall in no event be less than double the value as fixed by the appraisers appointed by the court." (§74.05, F.S.)

The condemning authority is allowed ten days from the date of this order in which to make its deposit into the registry of the

court and upon the deposit being made within the time allowed, title to the said lands in fee simple absolute or such less estate or interest therein as is specified in said declaration shall vest in the petitioner. (§74.06, F.S.) Upon the making of the deposit into the registry of the court, the petitioner becomes irrevocably committed to the payment of the ultimate award. (§74.10, F.S.)

In the event that the petitioner fails or refuses to make the deposit within the ten-day period fixed by the statute (§74.05), the order becomes void and of no further force and effect. However, this does not dismiss the main suit and the same may proceed to trial and jury verdict and award in the regular manner.

In proceedings under §74.01, et seq., F.S., the fee simple title to the property sought to be condemned vests in the condemning authority when the deposit required by the order of the court has been made into the registry of the court within the ten-day period fixed by the statute. It is my further opinion that the term "final judgment of the court," as used in §74.05, refers to final judgment after jury verdict and award and does not refer to the order of the court fixing the amount of the deposit required by that section.

REPLEVIN

November 26, 1951—051-425.

PERSONAL PROPERTY—HOLDING AS EVIDENCE IN CRIMINAL CASE—REPLEVIN

QUESTION: Where personal property is being held in custodia legis to be used as evidence in the prosecution of a violation of the state criminal laws, may such property be replevined by a person not a defendant in the criminal case, prior to the trial and disposition of such criminal case?

To: Honorable Henry W. Johnson, Constable, Manatee County, Bradenton, Florida:

Replevin is one of the oldest writs known to the common law, but today the action is governed, in Florida, entirely by statute, Ch. 78, F.S. This statute provides that no replevin shall lie for property which has been taken by virtue of any warrant for the collection of any tax, assessment or fine in pursuance of any statute in this state; nor at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods or chattels are exempt by law from such execution or attachment; nor at the suit of the original defendant in replevin for property taken in replevin and delivered to the plaintiff while the same remains in possession of the original plaintiff or his agent; nor at the suit of any person unless he shall have a right to reduce into his possession the goods taken, §78.02, F.S. The statute does not specifically mention property which is in the custody of the law to be used as evidence in criminal prosecutions, and the Supreme Court of Florida does not appear to have ever passed on this particular question.

The general rule is stated in 46 Am. Jur., page 30, under the title, "Replevin," §46, as follows:

"It had been the general American opinion for some time before the year 1914, that property in the hands of public authorities, to be used as evidence upon a criminal trial, could not, as a general rule, be recovered from them before the trial. There was, at the same time, a widely held opinion that the competency of evidence was not affected by the fact that it had been wrongfully procured. Under those circumstances, most of the cases denied the recovery of the property in a replevin action as a matter of course. Some cases, however, have allowed a recovery in replevin as well as other possessory actions, on the ground that the constitutional rights of the accused had been violated. The application of this latter principle to various factual situations has produced much confusion. It arises mainly from variations of opinion as to when the constitutional rights of the accused are violated."

It will be noted from the above language that in some courts it seems to be permissible for the defendant in the criminal suit to use the action of replevin against the officer holding the property as evidence as a method of determining whether or not the constitutional rights of the accused have been violated in obtaining the evidence. However, this situation would not apply to the question propounded by you as, in your case, the defendant in the criminal prosecution was not the party bringing the action of replevin.

In the case of *Adams v. Burns*, 126 Fla. 685, 172 So. 75, the Supreme Court used the following language:

"(5) When property is seized under a distress writ and is in possession and control of the sheriff, it may be considered as in custodia legis, *Ex parte Fuller*, 99 Fla. 1165, 128 So. 483, and any interference with that property amounts to contempt of court, *Hooker v. Wiggins*, 104 Fla. 355, 139 So. 803.

"(6, 7) Property once levied upon remains in the custody of the law and is not liable to be taken by another execution in the hands of an officer of another jurisdiction. *Hagan v. Lucas*, 10 Pet. (35 U.S.) 400, 9 L.Ed. 470. When property has been seized by an officer of the court under valid process, that property is in the custody and under the control of that court for the time being; and no other court has a right to interfere with that possession unless it has direct supervisory control over that court or unless it has some superior jurisdiction in the premises. *Buck v. Colbath*, 3 Wall. (70 U.S.) 334, 18 L. ed. 257; *Lammon v. Feusier*, 111 U.S. 17, 4 S. Ct. 286, 28 L.Ed. 337."

The above language would seem to indicate that the possession of property in the custody of the law may not be interfered with except by a court having supervisory control over the court exercising the possession or having some superior jurisdiction in the premises. That particular case did not involve property being held as evidence in a criminal prosecution.

In the more recent case of *Bloch v. Frick*, Sheriff, 152 Fla. 554, 12 So. 2d 604, the Supreme Court apparently modified its holding in

the Adams v. Burns case, *supra*, by saying that property which was in the hands of a sheriff by virtue of an execution issued to satisfy a judgment would be subject to replevin by a person or party who was a stranger to the case in which the judgment was issued. In reaching this conclusion, the Court there said:

"... As we interpret the court's opinion on petition for rehearing, the law is settled that a stranger to an execution may either replevy the property or file a claim for same. This remedy is expressly provided by statute in case the property is levied upon by attachment. Section 76.20, Florida Statutes 1941, F.S.A. §76.20. The legislature contemplated that the action would lie when property was held under other process except in certain enumerated instances. Section 78.06, Florida Statutes 1941, F.S.A. §78.06."

Here again, however, the property being dealt with was in the custody of the law by virtue of a writ of execution issued in a civil suit, and was not being held for use as evidence in a criminal prosecution.

The Florida criminal procedure statute (§901.21, F.S.), dealing with arrest, provides that:

"When any sheriff, deputy sheriff or other police officer shall lawfully arrest any person, the officer making such arrest, or his assistant, may search the person so arrested . . . and anything found on such person or in his possession which tends to show the guilt of such person of the violation of the law shall be admitted in evidence upon a trial in which such violation is charged."

Section 933.14, F.S., which deals with the return of property taken under search warrant, provides, among other things, the following:

"If no cause is shown for the return of any property seized or taken under a search warrant, the judge or magistrate shall order that the same be impounded for use as evidence at any trial of any criminal or penal cause growing out of the having or possession of said property."

It therefore appears that it is the clear intention of the Florida law that property in the custody of the law to be used as evidence in a criminal cause, which was obtained as the result of a search incident to a lawful arrest, or by virtue of a search conducted by virtue of a sufficient search warrant, should remain in the custody of the law until the disposition of the criminal case for which such property is being held as evidence. It is my opinion that anyone claiming title or right of possession to property being held as evidence in a criminal suit should file such claim in the court having jurisdiction of the criminal case, so that the court might determine the proper person to whom the property should be returned after the necessity of its use for evidentiary purposes had ended.

LANDLORD AND TENANT

December 19, 1951—051-466.

SMALL CLAIMS COURT—RENT EVICTION—DISTRESS PROCEEDINGS—JURISDICTION

QUESTIONS: 1. Does a Small Claims Court established

under Ch. 26920, Laws of 1951, have jurisdiction in rent eviction cases brought under §83.20, et seq., F. S.?

2. Does such a court have jurisdiction in distress proceedings brought under §83.11, et seq., F. S.?

To: *Honorable Virgil B. Conkling, Judge, Small Claims Court, Titusville, Brevard County, Florida:*

As to your first question, it will be noticed that §§83.21-83.27, F. S., set out the procedure for removal of tenants (eviction) by the county judge while §§83.28-83.38 detail the proper remedy by the county court. This appears to indicate that the intention of the legislature was that the county judge is to have sole jurisdiction in rent eviction cases, either in his capacity as judge of the county court, in those counties which have such courts, or else in his own capacity as county judge in those counties which do not have a county court.

This conclusion is also supported by the wording of §34.01, F. S., entitled "Jurisdiction of county courts" which provides that "county courts shall have jurisdiction of the following matters and things, to wit: . . . (3) of proceedings for removal of *delinquent tenants*." See, too, §34.01 (7). Also, §36.01, F. S., entitled "Jurisdiction of county judge" provides that "The county judge shall have . . . (2) original jurisdiction of proceedings relating to the forcible entry and unlawful detention of lands and tenements, which shall include actions for forcible entry and unlawful detainer and *proceedings against delinquent tenants*." Finally, it must be recognized that in a proceeding for removal of a tenant there is no amount of money or other thing of value demanded; the plaintiff in the action simply asks for possession of the premises. Consequently, no jurisdictional amount would be involved which would require prosecution of such remedy in any court except the county court or the county judge's court.

For these reasons, then, I am of the opinion that rent eviction cases can only be instituted in the county court or the county judge's court, and that the small claims court would not have jurisdiction in such matters. Your first question is therefore answered in the negative.

As to your second question, however, a different situation exists. The procedure outlined by §§83.11-83.19, F. S., for the statutory remedy of distress for rent permits such remedy to be prosecuted in any court in the county where the land lies, having jurisdiction of the amount claimed, and does not specifically enumerate the court or judge before whom the proceeding is to be brought. It appears, therefore, that any one particular case, depending upon the amount involved, might permit or require prosecution in the circuit court, in the county court, the county judge's court, or even in a justice of the peace court by virtue of Section 37.01, Florida Statutes.

Accordingly, since §3 of Ch. 26920, Laws of 1951, gives the small claims courts established thereunder concurrent civil jurisdiction up to \$250 with any other court in the county, it is my opinion that such a small claims court would have jurisdiction in distress proceedings brought under §§83.11, et seq., F. S., provided that such court is in the county wherein the land lies and the amount claimed does not exceed \$250.

Your second question is therefore answered in the affirmative.

CHAPTER VII
JUDICIAL PROOF

NO OPINIONS

CHAPTER VIII

LIMITATIONS

LIMITATIONS OF ACTIONS; ADVERSE POSSESSION

August 27, 1951—051-286.

MUNICIPALITY—PERFORMANCE BOND— LIMITATION CLAUSE

QUESTION: A municipality in this state has entered into contract with a company for the construction of a water supply system and in connection therewith the contractor has proffered to the municipality a performance bond which, among other provisions, has the following: "No claim, suit or action by reason of any default shall be brought against the principal or surety after two years from date hereof. If this limitation is made void by any law controlling the construction hereof, such limitation shall be deemed to be amended to equal the minimum period of limitation permitted by such law."

What is the construction of the quoted clause in said bond; that is to say, will a bond containing such wording fully protect the municipality under the stated circumstances?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The quoted clause in the bond fixes the period within which suits may be brought in connection with claims arising under and by virtue of said contract, with the further provision that if the limitation provided is made void by any law, such limitation shall be deemed to be amended to equal the minimum period of limitation permitted by such law. That is the sole purpose and effect of the quoted provision.

Section 95.03, F. S., provides in part and in effect that all provisions and stipulations contained in any contract fixing the period of time in which suits may be instituted under any such contract or upon any matter growing out of the provisions of any such contract at a period of time less than that provided by the statute of limitations of this state, are declared to be contrary to public policy and to be illegal and void.

With this explanation it would appear that there is nothing in the quoted provision of the performance bond mentioned which should cause concern to the authorities of this municipality.

CHAPTER IX

ELECTORS AND ELECTIONS

QUALIFICATIONS AND REGISTRATION OF VOTERS

March 16, 1951—051-56.

STATE OR FEDERAL LIQUOR STATUTES—VIOLATIONS —CONVICTIONS CIVIL RIGHTS—RESTORATION

QUESTION: Where, "during prohibition days" a person was convicted under federal or state laws of making or selling moonshine whiskey, and there has been no restoration to civil rights of such convicted person, did such constitute conviction of a "felony by a court of record" within the contemplation of Art. 6, §4, Florida Constitution, and §98.01 (4), or conviction of an "infamous crime," as such words are used in Art. 6, §5, Florida Constitution, and §98.01 (5)?

To: Honorable DeWitt Upthegrove, Supervisor of Registration, Palm Beach, Florida:

The section numbers used in this opinion relate to F. S., 1949.

On June 8, 1945, my immediate predecessor in office by his opinion 045-138 (A. G. R. 1945-46, pages 771-774) advised the State Board of Pardons with respect to the matter of conviction of a person of a misdemeanor in a federal court in relation to his civil rights as a citizen of Florida. That opinion dealt not only with civil rights in relation to suffrage but also in relation to holding of public office, testifying as a witness and service as a juror. A copy of such opinion is attached. In relation to the specified question above and the specific offenses mentioned therein, I agree with such opinion and attach a copy hereto.

Article 6, §4, Florida Constitution, provides in part: "... nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights." Section 98.01 (4) is to the same effect. Art. 16, §25, states that "felony, whenever it may occur in this constitution or in the laws of the state, shall be construed to mean any criminal offense punishable with death or imprisonment in the state penitentiary." Thus, under Art. 6, §4, and Art. 16, §25, the conviction of felony contemplated by §98.01 (4) would, of necessity, be in a court of record of this state. That was the construction of the court in *Duggar vs. State*, 43 So. 2d 860, dealing with comparable language in §§40.01 and 40.07 relating to qualifications of jurors.

Article 6, §5, Florida Constitution, provides, in part, that "the legislature shall have power to and shall enact the necessary laws to exclude ... from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime." In pursuance of such authority, in §98.01 (5) the legislature has provided that persons shall not be entitled to vote "who may have been convicted of

bribery, perjury, or larceny, or of any infamous crime in any court of this state, or any other state. . . ." It would seem reasonable that "court of any other state" includes courts of the United States.

Attention is directed to the discussion in the opinion 045-138 of what constitutes an "infamous crime" in this state; and the final conclusion that in the case of *Adams vs. Elliott*, 128 Fla. 79, 174 So. 731, our court apparently used the terms "felony" and "infamous crime" interchangeably. In relation to the criminal offenses described in the above question, such apparent construction of the court is here accepted as applicable.

(1) Section 98.01 (4) is to be construed as relating to the persons convicted of any felony in any court of the State of Florida. Hence, it would not include persons convicted of felonies in the courts of the United States. However, in view of former opinion 045-138 and the conclusions reached therein and above herein, in relation to the offenses described in the question it reasonably appears that the words "infamous crime" as used in §98.01 (5) are interchangeable in meaning with the word "felony"; and that, hence, under this subsection any person convicted of a felony involving one of these offenses in a court of the United States or of the State of Florida would constitute conviction for an infamous crime as contemplated by this subsection.

(2) The words in the request for opinion and as quoted in the question, "during prohibition days," are construed to mean during the period of time the XVIII Amendment to the United States Constitution and federal laws relating to the control of liquor enacted in pursuance thereof were in force and effect.

During such period of time the statutes of Florida made it unlawful to manufacture, sell, etc., intoxicating liquors. A conviction under such laws might constitute conviction for a felony or a misdemeanor, depending upon the circumstances and the charge made. (§§76.01-76.48, C. G. L.). Whether a person convicted in the state courts of any of the offenses set forth in the question, and whose civil rights have not been restored, is now disqualified to vote under §98.01 (4) and (5) must depend upon whether such a person was convicted on a charge which constitutes a misdemeanor or a felony. If he was convicted of a misdemeanor he lost no right of suffrage; on the other hand, if he was convicted of a felony and has not had his civil rights restored he is disqualified to vote. An examination of the court record in each individual case will evidence the nature of the charge of which the person was convicted.

(3) Whether or not a person convicted in a court of the United States of any of the offenses described in the question was convicted of a felony must depend entirely upon the charge made against him and the particular federal statute he was alleged to have violated. As to such persons it is suggested that in each individual case it be ascertained from the court records whether he was convicted of a misdemeanor or a felony under the federal laws as they then existed. If he was convicted of a misdemeanor he lost no voting rights under our constitution and laws; on the other hand if he was convicted of a felony and has not had his civil rights restored by proper authorities, he apparently has lost the right of suffrage under §98.01 (5). If in any one of these cases you will

ascertain the charge made and the federal law alleged to have been violated, this office will advise whether such constituted a felony or misdemeanor, upon request for such advice.

March 6, 1952—052-68.

ELECTORS—REGISTRATION QUALIFICATIONS

QUESTIONS: In view of the form of registration to be signed by a person registering to vote, that the person is twenty-one years or over and that he has resided in the state for more than one year and the county six months:

(1) Does the applicant have to be twenty-one years of age on or before the date of registration and a resident of the state one year and county six months or can he register if such is not a fact on the date of registration, but will be true prior to the first primary?

(2) If the above is answered in the affirmative may such a person register who does not have the requisite age and residence requirements at the date of registration or the first primary but who will have met such requirements prior to the date of the general election?

*To: Honorable Samuel Pinder, Supervisor of Registration,
Monroe County, Key West, Florida:*

The statement of age and residence in the state and county referred to in the above question and which every person desiring to register to vote must swear to is actually an embodiment of the oath required by Section 3, Article VI of the Constitution of 1885. It appears on the certificate of registration in pursuance of the requirement of §98.111, F. S., 1951. The oath is worded in the present tense in §3, Art. VI of the Constitution and that section specifically requires that it be sworn to "at the time of . . . registration." §2 of Art. VI decrees that:

"The Legislature . . . shall provide by law for the registration of all the legally qualified voters in each county, . . . ; and shall also provide that after the completion, from time to time of such registration, no person not duly registered according to law shall be allowed to vote."

thus evidencing an intention that registration be a prerequisite to voting. Our Election Code, as amended from time to time, was enacted in compliance with this Constitutional direction. §97.041 of the Code enumerates the necessary qualifications to register, one such qualification being that the applicant be 21 years of age "*at the time of registration.*" And §97.031 declares that no person whose name is not on the registration books is permitted to vote in *any* election.

Any further doubt as to whether the legislature or the people of this state intended a voter to be the proper age and have the necessary residence requirements at the time of the elections or at the time of registration to vote, should be dispelled by the fact that the present §1 of Art. VI requires that a person be 21 years old and a resident of the state one year and the county for six months "at

the time of registration" whereas the section prior to its amendment in 1894 required a person to be 21 years old only at the time of offering to vote. In conjunction with this amendment of §1, Art. VI, §7 of Art. VI which provided the procedure or method by which a person could prove his eligibility to vote at the time he offered his vote on election day was repealed by the people of this state in a general election.

Finally, it must be remembered that the right to vote is not an inherent or absolute right, but its possession is dependent upon constitutional or statutory grant. Where a constitution has conferred the right, and prescribed the qualifications of electors, it is paramount until amended, and the legislature cannot change or add to them in any way. (*State v. Dillon*, 32 Fla. 545, 14 So. 383).

From the foregoing it is apparent that the legislature in the enactment of laws prescribing the requirements to register and vote, and people of Florida in passing upon Constitutional Amendments pertaining to the eligibility for suffrage, intended to make registration a prerequisite to voting and intended that only persons who were 21 years of age and residents of the state for one year and county for six months at the time they attempted to register to vote, should be qualified to do so.

In view of the fact that question one is answered in the negative, it is manifest that question two is also answered the same.

March 25, 1952—052-105.

SUPERVISORS OF REGISTRATION—ELECTOR'S OATH IN ABSENTIA

QUESTION: Is it possible under the Constitution and Laws of Florida for a person to subscribe to the elector's oath (§97.051, Florida Statutes, 1951) without presenting himself in person before the Supervisor of Registration of the county of his legal residence?

To: Mrs. Louise Sale, Supervisor of Registration, Levy County, Bronson, Florida:

Section 97.062, F. S., the only section of the statutes which might be construed to permit registration in absentia, authorizes a Supervisor of Registration to preregister those persons under 21 years of age who will be in the armed services when they reach the age of 21, and to place their names on the registration books when they reach 21, whether they are present or not. Certain words of the statute indicate, however, that the persons to whom it applies must present themselves in person to the Supervisor of Registration of the county of their legal residence before they may avail themselves of the convenience offered by the statute. Those words state that a person who fits one of the descriptions set out earlier in the statute, "... may make application to the Supervisor of Registration ... presenting at the time evidence to show that he is about to be inducted ..." etc., "... and enter his name on a special registration book ... by filling out the following affidavit:" It is to be noted further that the affidavit requires that it be sworn to and subscribed before the Supervisor of Registration.

In all other sections of the statutes which deal with the regis-

tration of voters similar evidence may be found of the legislative intent that the oath must be taken and signed in the presence of the Supervisor or one of his deputies. (§§97.041 and 97.051, F.S.; §§1, 2, and 3 of Art. VI, Constitution of Florida; *State v. Page* 169 So. 854, 125 Fla. 348).

It is therefore my opinion that under the law of Florida a person may not legally register for the first time without subscribing to the elector's oath in the presence of the Supervisor of Registration of the county of his legal residence and that your question should be answered in the negative.

March 25, 1952—052-112.

NON RESIDENTS IN ARMED SERVICES—NATIONAL BALLOT—REGISTRATION

QUESTION: If a person in the armed service has not been in this state long enough to register for voting and has not been registered in the state before, is there any way he could vote on the National Ballot?

To: *Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale, Florida:*

The right to vote is ordinarily considered to be a privilege conferred by the state rather than a natural right of the individual or citizen. Except as they may be restricted by provisions of the federal constitution and laws enacted in pursuance thereof, the states have supreme and exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote. Accordingly, our Florida Constitution has decreed that only persons of the age of 21 years and upwards that shall, at the time of registration, be a citizen of the United States, and that shall have resided and had his habitation, domicile, home and place of permanent abode in Florida for one year and in the county for six months, shall be deemed a qualified elector. (Art. VI, §1) And by virtue of §2 of Art. VI, directing the legislature of this state to provide by law for registration of all legally qualified voters, no person not duly registered according to law is allowed to vote.

In conformity with these constitutional provisions our legislature has passed election laws providing, among many things, that the qualifications to register to vote in any election of this state shall be that a person be (1) 21 years or over (2) a resident of this state at least one year and (3) a resident of the county in which he wishes to vote, 6 months (§97.041, F. S.). Another provision of such laws specifically decrees that no person whose name is not on the registration books is to be permitted to vote in *any* election. (§97.031, F. S.). Therefore, unless such foregoing qualifications to vote imposed by the state interfere with some right or privilege of voting in elections for national offices as may be guaranteed by our Federal Constitution or laws, the person here in question cannot vote in this state for any national officers.

It is assumed for the purpose of this opinion that the term "national ballot" as used in the above question, refers to candidates seeking election as members of congress or as presidential electors. Although the constitution of the United States gives congress no

power to prescribe the qualifications of electors in the states, the right to vote for members of congress is fundamentally based on the federal constitution so that the electors of congress do not owe their right to vote to the state law in any sense which make the exercise of the right dependent exclusively upon the law of the state (29 C. J. S. §6.)

As to the election of such members of congress, the federal constitution provides:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature" Article I, Sec. 2.

The same qualifications for electors of senators are set out by the 19th Amendment to the U. S. Constitution. Thus it is to be noted that the right secured by the federal constitution to qualified voters to choose members of the congress is only to that extent secured by the various states in the selection of members to the most numerous branch of their legislatures. Since the person here in question does not have the necessary qualifications of an elector for members to our state house of representatives, it is apparent that such person has no qualifications which would enable him to vote for candidates for election to congress.

As to electors of President and Vice-President, Art. II, §1 of the United States Constitution specifically provides that each state shall appoint in such manner as the legislature thereof may direct electors of president and vice-president. As the manner of choosing said electors is left entirely to the discretion of the legislature of each state, it is obvious the federal constitution preserves to the person here in question no special right or privilege to vote for such electors which has been taken away by the constitutional and statutory provisions prescribing the requisite qualifications to vote in Florida.

Finally, a search of the federal statutes dealing with the subject reveals no law now in effect which would give the serviceman here in question a right to vote in national elections which he does not have under Florida law. Former §308 of Title 50, U.S.C.A., which abolished registration as a voting requisite for federal offices, and provided for a special federal ballot, has been repealed and the present provisions on the subject are contained in Sections 321-354 of Title 50, which consist of more recommendations to the states to waive registration requirements, and other non-mandatory provisions. Also §459 (i), Appendix to Title 50, U.S.C.A., grants a serviceman the right to vote, in person or in absentia in any election in the state in which he resides, *only if he is otherwise entitled so to vote in such election under the laws of such state.*

From the foregoing it must be concluded that the necessary qualifications of an elector of this state, as prescribed by our Florida constitution and statutes, also constitute the requisite qualification to vote in elections for national offices. Hence, the person here in question, not having registered nor possessing the qualifications to register in this state is not a qualified elector with the

right to vote in the elections of members to congress or presidential electors. However, it may be that the serviceman in question still maintains his legal residence in a state which provides for absentee voting, in which case he could take advantage of the provisions of such law and exercise his privilege of franchise in that manner.

July 28, 1952—052-234.

REGISTRATIONS—ABSENTEE BALLOT— SERVICEMAN'S WIFE

QUESTION: May the supervisor of registration send an absentee ballot to the wife of a serviceman, the wife not being registered, in order that she may vote while she is living out of state with her husband at his assigned place of duty?

To: *Mrs. Dove C. Falls, Supervisor of Registration, Pasco County, Dade City, Florida:*

Section 97.121, F. S., permits a person inducted into military service of the United States, and remaining in service when the registration books of any county are open for reregistration of electors, to vote without reregistering, provided, the person has registered as an elector and his name has not been removed from the registration lists.

Section 97.131, F. S., permits a person holding a position in the government of the United States or in military service to reregister without appearing personally before the supervisor of registration if the person is required to be absent from the state during the period of time required for the registration of qualified electors. A person in a case such as this must have retained his qualifications to vote under his last registration, must also forward to the supervisor of the county in which he is registered an affidavit stating in part that he holds a position in the government of the United States or in military service, and that due to his duties attendant thereto it is impossible for him to appear personally before the supervisor of registration within the time allowed by law for such reregistration.

The two above mentioned statutes set forth the only instances in which a person may vote without personally appearing before the supervisor of registration to reregister.

Since under §97.121, F. S., a serviceman's wife is not considered as a person inducted into military service, and under §97.131, F. S., she could not swear that she holds a position in the government of the United States or in the military service which requires her to be absent, it can be concluded that a serviceman's wife must appear personally before her supervisor of registration in order to be reregistered according to law.

Further, it appears that the serviceman's wife has never registered; and it should be noted that under §97.031, F. S., no person is entitled to vote unless registered according to law.

Your question stated above should be answered in the negative.
August 13, 1952—052-250.

GOVERNMENT RESERVATION—RESIDENTS' QUALIFICATION TO REGISTER

QUESTION: Is a person who has never before established his residence in the State of Florida, but has lived for at least one

year on a government reservation situated in Florida eligible to register and vote in the State of Florida?

To: Honorable M. B. Jones, Supervisor of Registration, Escambia County, Pensacola, Florida:

Section 97.041, F. S., states that one of the qualifications necessary for a person to register to vote is that he must be "a permanent resident living in Florida for one year and residing in the county where he wishes to register for six months". Under §97.051, F. S., a person making application for registration as an elector must take an oath, a part of such oath being the above quoted qualification.

This brings us to the question of whether or not the residence of a person on a government reservation is considered as a voting residence which is necessary under the above quoted law for the registration of a person as an elector. Under Elections, 29 C.J.S. §25, it states the following: "Since land which has been ceded by a state to the United States for the use of some department of the general government, without any reservation of jurisdiction except the right to serve civil and criminal process thereon, ceases to be a part of the state, . . . such land ordinarily cannot become a voting residence in the state in which it is situated, . . ."

The general rule which is set out in an annotation in 142 ALR at page 433 is "that when the Federal Government, under authority of Congress, exercises exclusive legislation over a tract of land situated within the state for any of the purposes mentioned in the provision of the Federal Constitution and such exercise of exclusive legislation by Congress is consented to by the state, a resident of such a tract of land is not deemed a resident of the state with authority to vote at state elections. This general rule is accepted in the following cases: *State ex rel. Parker v. Corcoran*, 128 P. 2d 999; *Herken v. Glynn*, 101 P. 2d 946, 950; *Arlidge v. Mabry*, 197 P. 2d 884; and *Johnson v. Inorrell*, 126 P. 2d 873. It should be noted that in all of the cases the decision turns on whether or not the Federal Government has exclusive legislation over the land. If the United States Government does not have exclusive legislation over the land, the residence is considered a voting residence.

Therefore, assuming that the Federal Government has exclusive legislation over the land here in question, the answer to your question as stated above should be in the negative.

October 13, 1951—051-360.

ELECTORS—FELONY CONVICTIONS—CIVIL RIGHTS RESTORATION

QUESTION: "If a person has been convicted of a felony and given a fine, does the fact that he has paid the fine restore his citizenship . . . ?"

To: Mrs. Easter L. Gates, Supervisor of Registration, Broward County, Ft. Lauderdale, Florida:

This question is presented by the above official in relation to qualifications of electors and the duty to remove from the registration list the name of a registrant who has lost his civil rights under the circumstances contemplated by the question.

Among the persons denied the right to vote are those convicted of any felony by any court of record and whose civil rights have not been restored (§97.041, F. S., as revised and amended in Ch. 26870, Laws of 1951; Art. VI, §4, Florida Constitution). It is here assumed that the question contemplates a person convicted of a felony within the meaning and intent of such statutory and constitutional provisions; and this opinion is conditioned upon such assumption.

A person who has lost his civil rights by reason of his conviction of such a felony may have such rights restored only by the board of pardons (Art. IV, §12, Florida Constitution; §940.05, F. S.; *Singleton vs. State* (Fla.) 21 So. 21). The payment of a fine imposed upon a person so convicted of a felony in no way restores his civil rights.

Hence, such a person so convicted is disqualified to vote until he shall register again *after* his civil rights have been restored by the board of pardons.

REGISTRATION OFFICE, OFFICERS AND PROCEDURE

January 7, 1952—052-5.

REGISTRATION BOOKS—OPENING TIME

QUESTION: Is it permissible under the provisions of §§98.011 and 98.021, Election Code of 1951, for a Supervisor of Registration of a county which is not under the permanent registration system provided by §§98.041 through 98.151, and which is not under a permanent system set up by population or local acts specifically providing times at which registration books shall be open, to open the registration books in the various precincts prior to the hour prescribed?

*To: Honorable Angus W. Harriett, Attorney at Law,
Palatka, Florida:*

The intent of the first sentence of §98.011, Election Code of 1951, is that the Supervisor of Registration in those counties which come under the provisions of this section shall (1) keep the registration books open in the registration office from 9 A. M. to 12 Noon and from 2 P. M. to 5 P. M. on every week day unless the county commission decides that the hours or days for opening the books should be otherwise, and (2) keep the books open at least one day a week and every day for thirty days prior to closing the books for an election, even if the county commission decides that every day in the week during all the year is more time than is necessary to keep the books open.

In the counties wherein it applies, the intent of §98.021 is that (1) if necessary (that is if it is seen by the Supervisor of Registration that the voters cannot conveniently register at the registration office), the books may be taken out to the various precincts and opened there every day of the week during the month of January in even numbered years and for one night during each week in January, and (2) even if the Supervisor of Registration decides that it is not necessary to keep the books open in the precincts in the manner described above, the books must be kept open in the precincts for at least one day of each week in January unless the county com-

mission decides that it is not necessary to keep the books open at all.

Both sections are almost entirely directory in nature. The only unconditional mandate found in the first sentence of §98.011, is that "... the registration books must be kept open at least one day in each week, and every week day for thirty days prior to closing for any primary or general election..." The "day" referred to in the quoted portion of §98.011 must be assumed to be that portion of a day from 9 A. M. to 12 Noon and from 2 P. M. to 5 P. M., but there is no statement from which it may be inferred that these hour limits are the maximum limits. If any thing, the hours described were intended to be the minimum number of hours in the "day" referred to in the quotation.

In §98.021 the only unconditional mandate which concerns the time when books shall be open in precincts is that the registration books must be kept open in the precincts for at least one day of each week in January of even numbered years. This construction is in accord with that recently given in Attorney General's Opinion 051-387 wherein it was intimated that the "one day" during which the books are required to stay open shall consist of the hours from 9 A. M. to 12 Noon and from 2 P. M. until 9 P. M. as described in §98.021.

Therefore, it is my opinion that the answer to the question as set forth herein is as follows:

The statement in §§98.011 and 98.021 as to the hours during which registration books are required to remain open are indicative of the intent of the legislature that when registration books are required (either by the statutes considered herein or by rules prescribed by the Supervisor of Registration or the county commission) to be open on certain days, the hours shall conform generally with those described in the statutes; and nothing in said statutes may be construed to prohibit the opening of registration books at a somewhat earlier hour than that directed so long as the general intent of the statutes is accomplished; that is, so long as the registration books of the county shall be accessible to the electors at least during the days absolutely required by the statutes, and for at least the total number of hours described in the statute but primarily at hours which are most convenient to the electors.

March 3, 1952—052-61.

REGISTRATION BOOKS—ELECTORS—INVALIDS

QUESTION: May a supervisor of registration, without violating any provisions of the law concerning registration procedure, take the appropriate registration books to the bedside of an invalid in order that such person may be registered or reregistered, as the case may be, in time to vote in any election in which he is otherwise entitled to vote?

*To: Honorable Lendell Sharer, Supervisor of Registration,
Manatee County, Bradenton, Florida:*

For the purposes of this opinion it is assumed that Manatee County is operating under one of the two registration systems pro-

vided by Ch. 98, F. S., and not under a system set up by a special or local act. The latter type act may make provision for or against the action which is here being considered. If, however, upon examination of any applicable special or local acts it appears that they have no provisions which conflict with the following quotations from Florida Statutes, then the general state law shall control the conduct of a supervisor of registration as to the particular point considered by this opinion.

Section 98.201 provides in part that, "The supervisor is the official custodian of the books of registration with the exclusive control of matters pertaining to the registration of electors . . ."

Section 101.61 provides that any "... registered and qualified elector who due to physical disability is unable without another's assistance to attend the polls . . . may cast an absentee ballot . . ."

Section 97.041 provides that "any person 21 years of age . . . who is a citizen of the United States, a permanent resident living in Florida for one year and residing in the county where he wishes to register for six months, is eligible to register with the supervisor when the registration books are open . . ." None of the categories of persons who are not entitled to register may be said to include persons who are so physically incapacitated as to be unable to register at the office of the supervisor of registration.

Since a method is provided for the voting of a person "... who due to physical disability is unable without another's assistance to attend the polls . . .," and since there does not appear to be any statutory prohibition against taking the registration book to an invalid, it must be assumed that the legislature intended that incapacitated persons should not be disfranchised because of a physical condition which prevents them from registering to vote at the office of the supervisor.

It is, therefore, my opinion that a supervisor of registration, provided no special or local laws applicable to him preclude the construction followed herein, may take the appropriate registration books to any qualified individual in the county when it becomes evident to the supervisor that because of his physical incapacity a person will be unable to put his registration status in order prior to the closing of the registration books before any election in which, except for his improper registration, the invalid would be entitled to vote by absentee ballot. In no instance is there a mandatory duty on the part of the supervisor to perform the acts described above; and in no instance shall the supervisor take the books to a person who has, prior to the occurrence of his physical disability, had ample time in which to rectify any irregularities in his registration. In all circumstances the supervisor shall, in his capacity of official custodian of the registration books, exercise his sound discretion to the end that no person shall take undue advantage of the service which this construction of the law allows a supervisor to render for him.

March 6, 1952—052-69.

SUPERVISORS OF REGISTRATION—REGISTRATION BOOKS—REVISION

QUESTIONS: 1. Is April 5th the proper date for the clos-

ing of the registration books prior to the May Primary Election in Dixie County, Florida, where the permanent registration system has not been adopted?

2. Should the County Commissioners of Dixie County, Florida, on the first Wednesday after registration books of that county are closed, examine and revise the registration books of the county?

To: Honorable Cauley C. Copeland, Clerk of the Circuit Court, Dixie County, Cross City, Florida.

The permanent registration system which is provided by Ch. 26870, Laws of 1951, appears in §§98.041-98.151, F. S., §98.151 thereof providing that until the permanent registration system is in effect in a county the "existing state laws relating to registration of electors shall remain in full force and effect." The "existing state laws" which relate to the registration of electors are found in §§98.011-98.031 and 98.161-98.381, F. S. These latter Sections then will control in those counties wherein the permanent registration system is not in effect and where there are no applicable special or local acts.

Section 98.011, F. S., is a part of the "existing state laws" and provides, among other things, that "All the registration books close on the thirtieth day preceding the day on which there is a primary or general election and remain closed for five days following the election." Thus it seems that the registration books in Dixie County, Florida, should be open on April 5th, 1952, but closed thereafter until five days following the election.

Question number one is therefore answered in the affirmative.

Section 98.40, F. S., was repealed by §9, Ch. 26870, Laws of 1951, hence it is not a part of the "existing" law. The registration supervisor is required, by §98.181, to revise the registration books and by §98.371 he is directed to certify to the county commissioners the names of all persons which have been stricken from the registration books by reason of death or ineligibility to vote, but apparently the county commissioners are no longer required to revise the books.

Question number two is properly answered in the negative.

April 10, 1952—052-122.

PERMANENT SINGLE REGISTRATION SYSTEM— ADOPTION—CONFLICTING LOCAL LAWS

QUESTION: Have Chs. 27267 and 26866, Laws of 1951, dealing with registration of voters in Hillsborough County, been repealed by virtue of the County Election Board's adoption of the permanent single registration system set out in §§98.041 through 98.151, F. S.?

To: Honorable James S. Moody, Representative, Hillsborough County, Plant City, Florida:

Chapter 27267, Laws of 1951, provides for the registration of voters in the election precincts in Hillsborough County during the

last three weeks in March, 1952, and every four years thereafter. Chapter 26866, Laws of 1951, amends several previous acts relating to elections, electors, and registration procedure, Sections 98.041 through 98.151, Election Code of 1951, provide a permanent single registration system which must be established in all counties on or before January 1, 1960. (§98.041, F. S.). In counties which have a permanent registration system, which is in substantial compliance with the requirements of the state permanent registration system, the Board of County Commissioners may by resolution adopt the state system. (§98.141, F. S.) Section 98.151, F. S., provides that: "... upon the adoption of this permanent registration system, all state laws in conflict or inconsistent with the provisions of this code shall cease to remain in full force and effect."

Section 8 of Ch. 22195, Laws of 1943, as amended by §4 of Ch. 22723, Laws of 1945, provides that: "All administrative acts, relating to elections . . . , which are by general law vested in the Board of County Commissioners (of Hillsborough County) and required to be done and performed by it under such law, shall be transferred to and vested in the (Hillsborough) County Election Board which shall do and perform all such administrative acts relating to elections."

Since the last quoted section is not in conflict or inconsistent with any of the provisions of the state permanent single registration code or system, it is still in full force and effect, and the Hillsborough County Election Board becomes thereby the proper agency to carry out the functions described in §98.141, F. S., to the Board of County Commissioners. The state laws which lose their force and effect upon the adoption of the state registration system by a county are those special or local acts which provide different mechanics and procedures for the registration of voters. Section 98.041 was not intended to render ineffectual state laws which set up procedures in certain areas for the conduct of elections or for the general supervision of elections or for the establishment of Boards which assume the duties of the Board of County Commissioners in relation to election matters. See also §98.381, F. S.

It is, therefore, my opinion that the question submitted should be answered as follows:

Assuming that the Hillsborough County Election Board, after receiving the approval of the Secretary of State as indicated in §98.041, F. S., has by resolution adopted the permanent single registration system found in Ch. 98, F. S., that system is in full force and effect in Hillsborough County; and by virtue of §98.051, F. S., all state laws which would provide in Hillsborough County a registration procedure inconsistent with that adopted no longer have any force and have ceased to be effective. One law which is so rendered ineffectual is Ch. 27267, Laws of 1951. Also, those portions of Ch. 26866, Laws of 1951, which are in conflict or inconsistent with the permanent single registration system adopted in Hillsborough County are of no effect.

It is to be noted that §98.151, F. S., is an exception to the provision of §104.44, F. S., and that the latter section will, after January 1, 1954, repeal all then existing local laws which conflict with any provisions of the Election Code of 1951, provided there are no

further exceptions made in the Election Code or in subsequent legislative acts.

April 22, 1952—052-132.

VOTING RESIDENCE—ESTABLISHMENT—WIFE OF
SOLDIER IN FOREIGN SERVICE

QUESTION: May a married woman, whose husband for the last past year has been in military service overseas, establish a residence in Citrus County, Florida, and register as an elector therein, when the last domicile of her said husband before entering military service was in Pinellas County, Florida, and where he is now a registered elector?

To: *Honorable O. Frank Scofield, County Judge, Inverness, Florida:*

It appears from the request for opinion that the married woman in question has resided in this state all of her life and that she is a citizen and resident of the state; for the last eight months she has resided in Citrus County, Florida. There is no showing that the wife ever resided with her said husband in Pinellas County, or that if she ever resided there with him that she was ever registered as an elector therein. If the wife is a registered voter in this state her county of registration does not appear from the said request for opinion. It appears that the husband does not own a home in Pinellas County, but that his last place of residence was that of his parents. It is stated in the letter that if the husband was not in military service that the wife would be residing with him wherever he might be residing. From aught appearing they may have married after the husband entered military service. There is nothing appearing from the request for opinion showing that the wife is now registered to vote in any county of the state. From anything appearing in the said request for opinion the wife may have been established in Citrus County, Florida, by the husband; or if she was not established by him in said county her residence therein is with his full knowledge and consent.

In order for a person to qualify as an elector in a county he or she shall have resided in such county for six months (§1, Art. VI, State Constitution); the fact that a woman may have been the wife of a man residing in a county for the required length of time will not qualify her as an elector unless she shall have actually resided in the county for the required length of time (*Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809, text 812). Married women have in many cases been permitted to establish a domicile different from that of her husband for purposes other than divorce, separation and maintenance (Annotations in 75 A. L. R. 1254, and 90 A. L. R. 358). Where the husband is a registered voter in one county, but he and his wife have since marriage maintained a temporary residence in another county, the wife may remain an elector of the county of her former residence (*Wilkerson v. Lee*, Ala., 181 So. 296, text 298). There is considerable authority permitting a wife to acquire a separate domicile from that of her husband with his consent (Annotation in 75 A. L. R. 1260 and 1270).

For a person to be entitled to register as an elector in a particular county he or she *shall have resided and had his or her habi-*

tation, domicile, home and permanent abode in the state for one year and the county for six months. (§1, Art. VI, State Constitution). Actual residence seems to be required; constructive residence is not sufficient. If the wife never lived with her husband in Pinellas County, Florida, she was not qualified to register and vote there (*Everman v. Thomas*, 303 Ky. 156, 197 S. W. 3d. 58, text 65). We are not advised as to the residence of the wife prior to her residence in Citrus County about eight months ago.

Under the facts now before us the above question cannot be answered. If the wife resided with her husband in Pinellas County, Florida, she should register to vote there; unless the husband has consented to a change of their residence to Citrus County. Doubtless a member of the armed services of the United States, although a resident of a certain county when called into service, may select another domicile for his wife and family, and the fact that he may have previously registered in another county will not prevent his establishing another residence for himself and family. If the wife has never been a resident of Pinellas County, although her husband may have claimed that county as his residence prior to marriage, she would be permitted to establish her voting residence in Citrus County if her husband has settled her in that county and consents to her establishing her residence there. Although we are unable from the facts before us to answer the above question we feel that the above observations furnish the formula for answering the same.

April 30, 1952—052-140.

SUPERVISORS OF REGISTRATION—PRECINCT TRANSFERS

QUESTION: Is the supervisor of registration of DeSoto County permitted to transfer names of electors on the registration books of said county from one precinct to another during the period between the date said books closed on April 5, 1952, and the date of the first 1952 primary election?

To: Miss Sallie Ivey, Supervisor of Registration, DeSoto County, Arcadia, Florida:

The request for opinion does not state the registration system applicable in DeSoto County. Generally, it may be said that registrations in counties in Florida are under one or the other of the systems described: (1) Permanent registration systems provided by local or population acts. (2) The permanent single registration system provided by §§98.041-98.151, F. S. (3) The system, other than the single permanent registration system mentioned, provided by the general provisions of the Election Code of 1951. (4) The system mentioned in the preceding sentence modified by special act or acts as to one or more features.

Without engaging in exhaustive search, it appears that DeSoto County is under the system mentioned in sentence (3) in the preceding paragraph. In any event such is here assumed and this opinion is conditioned on such assumption. The officer to whom this opinion is directed will know whether this assumption is correct, and if not, she may advise us and request further instruction in the matter.

Prior to the adoption of Chs. 25390 and 25381, Laws of 1949, provision was made in our laws for the transfer upon the registration books of registrants who moved from one district to another. (See §§98.33 and 98.39, F. S., as they existed on the effective date of such mentioned chapters, which sections were respectively repealed thereby). While it is not here necessary to determine the question of the right of the supervisor to effect such transfers during the period prior to the date the books closed before the first 1952 primary, grave doubt exists of the regularity of such transfers during such time, by reason of the absence in the Election Code of 1951 of the specific right to do so. It is sufficient here to state that in the registration laws of Florida as they presently exist, apparently applicable here, there is no specific authorization for the supervisor of registration to transfer the name of a registrant from one precinct to another between the date such books closed on April 5, 1952, and the date of the first 1952 primary election.

Hence, conditioned as aforesaid, the question is answered in the negative.

July 29, 1952—052-237.

SUPERVISOR OF REGISTRATION—SALARY INCREASE —LEE COUNTY

QUESTION: May the county commissioners of Lee County, under §98.161, F. S., increase the salary of the supervisor of registration to \$3,000 per annum, notwithstanding the fact that Ch. 24056, Laws of 1947, fixes the salary for said supervisor at \$2,000 per annum?

To: *Honorable Thomas W. Shands, Ft. Myers, Florida:*

The Election Code of 1951, a revision of the election and registration laws of Florida, embracing revised Chs. 97 to 104, both inclusive, F. S., became effective September 1, 1951. A part of §98.161, F. S., provides that the compensation of the supervisor of registration "shall be of such sum in proportion to the amount of work to be done and allowed by his board of county commissioners; provided, that the compensation is not less than one hundred dollars per annum." Section 104.44, F. S., provides that, "All local laws that conflict with the Election Code of 1951, shall stand repealed after January 1st, 1954."

Chapter 24056 is a population act. Under its rather peculiar terms, it purported to fix the annual salary of the supervisor of registration at \$2,000 in counties in the 21,500-24,000 bracket according to the last state census. At the time of its passage the counties of St. Johns and Lee were included in such bracket. At this time, it appears that the counties of Lee, Putnam and Brevard fall within the 21,500-24,000 population classification. (See 1950 Federal Census; also Art. VII, §5, Florida Constitution.) The records of the Secretary of State's office fail to disclose that notice was given in Lee County of intention to apply to the legislature for passage of the act.

It appears that the determination of the above question may require settlement of one or more of the following questions:

(1) While Ch. 24056, Laws of 1947, is in form a general act, is it in legal effect a local act? See, among other authorities, State ex rel. Gray v. Stoutamire (Fla.) 179 So. 730; State ex rel. Buford v. Daniel (Fla.) 99 So. 804; Anderson v. Board of Public Instruction of Hillsborough County (Fla.) 136 So. 334; and Carter v. Norman (Fla.) 38 So. 2d. 30.

(2) If Ch. 24056 is a local law, since it appears that no notice of intention to apply to the legislature for its passage was given, is it valid? See Art. III, §21, Florida Constitution and §§11.02-11.04, F. S.

(3) If Ch. 24056 is a local law, is it valid in the light of that part of Art. III, §20, Florida Constitution, which prohibits the passage of local acts "regulating the fees of officers of the state and county"? On this point generally, see Manatee County v. Davidson (Fla.) 181 So. 889; State v. Foley (Fla.) 182 So. 195; and State v. Neville (Fla.) 167 So. 650.

(4) If it should be conceded that Ch. 24056 is a general act as distinguished from a local act, reasonably is not such an act, with its limited territorial application, a "local" law within the legislative intent of §104.44?

(5) If it should be conceded that Ch. 24056 is a general act and not a local act within the meaning of §104.44, has not such act been repealed by "The Election Code of 1951"?

It is the firm policy of this office not to give opinions concerning the validity of a legislative act under the circumstances here found. The reasonableness of that policy is quite obvious: only the courts in proper proceedings can determine with finality the validity of a legislative act. When this office is confronted with an act of doubtful validity and forced to a position with respect to it, the validity of the act is assumed, and any opinion involving such an act is conditioned on such assumption. Thus, if we take the position that Ch. 24056 is a local law within the contemplation of §104.44, and we assume it to be valid, we are then led to the conclusion that Ch. 24056, and not §98.161, controls as to this supervisor's salary.

Here we are dealing with the desire of a board of county commissioners to increase substantially the salary of the supervisor of registration of their county. We are also concerned with the regularity of the expenditure of public funds. Certainly the propriety of the proposed increase in the supervisor's salary should not be determined on assumptions and conditions. The matter should be determined by the courts.

In view of the foregoing, it is suggested that this question be submitted to the proper court for adjudication in declaratory judgment proceedings.

August 7, 1952—052-244.

SUPERVISORS OF REGISTRATION—TRAVELING EXPENSES

QUESTION: Should traveling expenses be allowed under §10, Ch. 23741, Laws of 1947, to the Supervisor of Registration for at-

tending a properly called Legislative Committee meeting of the Florida State Association of Supervisors of Registration?

To: Honorable DeWitt Upthegrove, Supervisor of Registration, Palm Beach County, West Palm Beach, Florida:

The Legislative Committee meeting of the Florida State Association of Supervisors of Registration was called by the President of said Association for the purpose of discussing legislation to be presented to the Legislature when it officially meets in 1953.

Under §11, Ch. 23471, Laws of 1947, the Supervisor of Registration of Palm Beach County is granted traveling expenses while performing his official duties. In my letter of July 23, 1952, to this public official I stated on the basis of the reasoning in opinions No. 049-411 and No. 051-303 that where he, as Supervisor of Registration, attends the annual meeting of the Florida State Association of Supervisors of Registration, he is performing an official duty in attending the meeting, and, therefore, is entitled to collect traveling expenses under the above mentioned general law.

It is my opinion that the attendance of a Supervisor of Registration at the Legislative Committee meeting of the association should be considered as performing an official duty. I believe that there should be no distinction, as far as the question of official duties is concerned, between an annual meeting and a legislative meeting of the association. Therefore, the question is answered in the affirmative.

September 4, 1952—052-267.

SPECIAL DEMOCRATIC PRIMARY—VACANCY IN NOMINATION—CLOSING REGISTRATION BOOKS

STATEMENT and QUESTION: On October 14, 1952, there will be held throughout the state a Democratic primary to fill a vacancy in nomination for the office of Justice of the Supreme Court, and in certain of the counties to fill other vacancies in party nominations. In view of the provisions of §§98.011 and 98.051, F.S., and such intervening special party primary, when do the registration books close for registrations for the 1952 general election?

To: Honorable R. A. Gray, Secretary of State:

Pertinent features of §98.011 are quoted as follows:

"... All the registration books close on the thirtieth day preceding the day on which there is a primary or general election and remain closed for five days following the election. No person shall register at any time other than during the period provided for registration of electors"

"When a special election is called at a time when the books are open the supervisor shall close all books to further registration thirty days prior to election date or immediately in the event the date of the election is less than thirty days."

Relevant features of §98.051, a part of the single permanent registration system provided by §§98.041 to 98.151, both inclusive, F.S., are as follows:

"(3) The books shall close on the thirtieth day before each election at 5 o'clock P. M. and remain closed for five

days after the election, after which they shall be open for permanent registration except in bond elections as contemplated by article IX, section 6, Florida Constitution."

Generally, it may be stated that in pursuance of the provisions of the Election Code of 1951, counties in this State operate under one or the other of the mentioned registration systems: (1) Counties which heretofore have adopted permanent registration systems by population laws or laws particularly applicable to named counties. It is our construction of §§98.151 and 98.381 that where a county has such a permanent registration system, the laws establishing it remain effective until January 1, 1960, unless prior to that date the county adopts the permanent single registration system provided by §§98.041 to 98.051, both inclusive. (2) Counties which have adopted the permanent single registration system required by §§98.041 to 98.151, both inclusive. (3) Counties which fall in neither of the categories mentioned above herein, whose registrations are controlled by the provisions of Ch. 98, F.S., other than those mentioned sections pertaining to a single permanent registration system. (4) Those counties falling in the last category mentioned which have special laws pertaining to registrations different from the provisions of the mentioned general laws. Under the provisions of §104.44, F.S., 1951, it appears that such local laws remain effective until January 1, 1954.

If there existed in this state the registration system provided by the general laws prior to the effective date of the Election Code of 1951, this question would present no difficulty for the reason that such prior general laws required registration books for primary elections and registration books for general elections. Such is not now the case. Even those counties which operate under the general provisions of Ch. 98, other than those provisions establishing a single permanent registration system, now are supposed to have one set of registration books for use in both primary and general elections. With respect to this requirement see attached copy of opinion 051-480.

We have carefully considered the definitions set forth in §97.021, F.S., relating to various types of primary and general elections. We have also carefully considered what must have been the legislative intent in adopting the quoted provisions from §§98.011 and 98.051. From these we have concluded that counties operating under these laws are required to close the registration books thirty days prior to the regular primary election, the general election, and any special primary election or special general election, at least as to any such election. We do not consider it to have been the legislative intent that a *party* special primary election occurring within the thirty-day period prior to the general election should be permitted to cause a closing of all registration books for registrations for the general election.

In view of the foregoing, in my opinion the question properly is answered as follows:

(1) In those counties operating under the single permanent registration system provided by §§98.041 to 98.151, both inclusive, F.S., and in those counties operating under the provisions of Ch. 98, F.S., 1951, except such mentioned sections which provide for

the described single permanent registration system, only those Democratic electors who have registered on or prior to the thirtieth day before October 14, 1952, may participate in the special primary mentioned. However, the registration books will not close for registrations to permit electors to vote in the 1952 general election until the thirtieth day prior to November 4, 1952. The mechanics for carrying out the intent of this paragraph should not be difficult. In those counties having permanent registration systems, the forms or cards used in registering Democratic voters during the thirty-day period prior to said special party primary may be segregated by the supervisor. It is our understanding that in those counties using the old form of registration books, when an elector registers the date of registration is noted; and such dates being so noted will indicate whether or not the voters are eligible to vote in said special Democratic primary.

(2) In those counties which have permanent registration systems under laws applicable to the particular county or under population acts, and in those possible counties which operate under the provisions of Ch. 98, F.S., except §§98.041 to 98.151, both inclusive, and which have effective local laws relating to the opening and closing of registration books, and which laws relating to the closing of registration books approximate in legal effect the above-quoted wording from either §98.011 or §98.051, the opinion stated in preceding paragraph (1) is applicable.

October 23, 1951—051-369.

REGISTRATION BOOKS—CLOSING—BIENNIAL SCHOOL DISTRICT ELECTION

QUESTION: When do the registration books of Charlotte County close prior to the date of the regular 1951 biennial school district election?

To: *Honorable Earl D. Farr, County Attorney, Punta Gorda, Florida:*

It is here assumed that registrations in Charlotte County are not controlled by special or population act applicable in said county, and that said county has not as yet adopted the permanent registration system provided by §§98.041-98.151, both inclusive, F.S., as revised and amended in Ch. 26870, Laws of 1951. It is further assumed that the times during which such books shall remain open and shall close are controlled by §98.011, as revised and amended in Ch. 26870. This opinion is conditioned upon such assumptions.

Section 98.011 provides, in effect, that the registration books shall close on the "thirtieth day preceding the day on which there is a primary or general election"; and shall close thirty days prior to a called "special election" or immediately in event the date of the election is less than thirty days.

The terms "primary election," "general election," "special primary election," and "special general election," as used in Ch. 26870, are defined in §97.021 as revised and amended therein. It is apparent that a regular biennial school district election is not a "general election" or a "special election" as the same are defined in said section.

Prior to the adoption of amended and revised §98.011, the time for the closing of the registration books prior to an election was fixed by §98.22, F.S. That former statute provided in effect that the books should close the thirtieth day preceding a general election. In construing such provision in relation to a regular biennial school district election, this office held in opinion 050-418 (A.G.R. 1949-1950, page 99) that such an election is a general election; that under the law as it then existed the registration books should close the thirtieth day prior to the date such election is held.

There is no provision in the school code touching upon this subject. In view of the restricted definition of "general election" as set forth in the Election Code of 1951, there is no provision in such election code providing for the closing of the registration books prior to a regular biennial school district election. It therefore would seem to follow that persons otherwise qualified to participate in such an election who register up to the date of such election should be permitted to vote therein. Thus the certified list to be prepared by the supervisor of registration for use at such election as contemplated by §236.32 (2) (b) and (d) F.S., should include the names of such qualified electors who register at any time prior to the date of said election; or if at the time of their registration such list has been completed, the names of such registrants should be added thereto.

November 9, 1951—051-404.

DEPUTY SUPERVISORS OF REGISTRATION— APPOINTMENT—COMPENSATION

QUESTION: Does a board of county commissioners have authority to employ an assistant supervisor or deputy supervisor of registration?

To: *Honorable George J. Dykes, Clerk, Board of County Commissioners, Lake County, Tavares, Florida:*

It would appear that under the provisions of §98.271, F.S., deputy supervisors of registration may be appointed by the supervisor of registration. The necessity for employment of one or more deputy supervisors is left to the discretion of the county commissioners and the compensation of said deputies or assistants is paid by the board of county commissioners.

In view of the changes in the law provided by Ch. 26870, Acts of 1951, the following should be noted. In so far as this opinion conflicts with Attorney General's opinions 050-328 and 050-346 previously issued by this office, said previous opinions are superceded and are no longer in force.

December 12, 1951—051-451.

ELECTION DISTRICTS—RELOCATION—VOTERS— REGISTRATION STATUS

QUESTION: Will it be necessary that voters in Seminole County reregister upon their being placed in a different election district or precinct in accordance with a proposed relocation of election districts in such county?

To: Mrs. Camilla D. Bruce, Supervisor of Registration, Sanford, Florida:

It is assumed that the relocation of election districts in Seminole County will be carried out according to the procedure described in §98.031, Election Code of 1951, (formerly §98.23, F.S., 1949) and that the notices prescribed by §101.73, Election Code of 1951, (formerly §§98.25 and 98.26, F.S., 1949) shall be published.

Section 2, Ch. 25019, Laws of 1949, relating to the establishment of a permanent registration system in Seminole County provides that "... the registration for the year 1950, as provided in §1, shall be a permanent registration of all voters so registered for all subsequent elections, general or special, except municipal elections, held in said county, and it shall not be necessary for any such voter to reregister for any subsequent elections held in said county except that such voters as shall change their residence from one precinct to another in said county, or shall remove from said county, shall have this fact noted upon the registration books . . ."

The section quoted above makes it clear that the registration of a voter is permanent. Even when a voter moves to a different precinct, he is not required to reregister, but only to see that the notation to that effect is made on the registration books.

The legislature considered the notice required by §101.73, Election Code of 1951, to be sufficient to inform a voter of his changed status. Since this is so, it follows that the voter is then under the same obligation as he would be had he moved his residence to another precinct; that is, it is the responsibility of the voter to report the change to the supervisor of registration in order that the necessary notation may be made on the registration book. It is my opinion that reregistration is not necessary and that it is sufficient if, at the instigation of the voters concerned, notation is made on the voter's loose leaf record card to the effect that he has been located in another election district by the redistricting which is intended in Seminole County.

The question submitted is answered in the negative.

December 20, 1951—051-473.

SUPERVISORS OF REGISTRATION—BOOKS— REGISTRATION PERIODS

QUESTION: Are the provisions of §98.011, F.S., as revised and amended in Ch. 26870, Laws of 1951, applicable in Palm Beach County?

To: Honorable DeWitt Upthegrove, Supervisor of Registration, Palm Beach County, West Palm Beach, Florida:

Chapter 26870, is a comprehensive revision and codification of the registration and election laws of Florida, and is designated in the act as "The Election Code of 1951." Unless otherwise specifically indicated, the sections mentioned below are the revised and amended sections of Florida Statutes appearing in said chapter.

Section 98.011 relates to the times during which the registration books of the county are kept open in the office of the supervisor

of registration. The provisions of this section are not applicable in those counties operating under the registration systems or laws mentioned: (1) Counties which have adopted the permanent single registration system prescribed by §§98.041 to 98.151. (2) Counties which operate under permanent registration systems established by local or population acts. In this connection see §§98.141, 98.151 and 98.381. (3) Possible counties which, at the effective date of Ch. 26870, were operating under valid local or population acts fixing the periods when the registration books are open for registration purposes. See §104.44.

Chapter 23741, Laws of 1947, provided a permanent registration system for Palm Beach County, was filed in the office of the Secretary of State on May 22, 1947, and by the terms of §19 thereof, became immediately effective. Ch. 23903, Laws of 1947, provided a permanent registration system in the counties of the state within the 100,000-130,000 population brackets. It was filed in the office of the Secretary of State on June 3, 1947, and by virtue of Section 17 thereof became effective immediately. In 1945, Palm Beach County had a population of 112,311; the 1950 census evidences a population of 114,688.

In opinion 047-385 (A.G.R. 1947-1948, page 68) my immediate predecessor in office dealt with the question of the application of these laws in Palm Beach County, and concluded in substance as follows: assuming the validity of both such acts, in the absence of a court adjudication, registrations in Palm Beach County were controlled by Ch. 23903, and §§10 and 11 of Ch. 23741.

Chapter 26100, Special Laws of 1949, provided for validation of registrations in Palm Beach County under Ch. 23741. We have been unable to locate any subsequent laws amending or changing the provisions of either Chs. 23741 or 23903.

In former opinion 047-385 it was remarked that while no attempt was made therein to give an opinion on the point, a casual comparison of the provisions of Ch. 23741 and 23903 would seem to indicate that if, in any proceeding properly brought, Ch. 23903 were adjudicated invalid as a local act and Ch. 23741 were left standing, following the provisions of Ch. 23903 would do no violence to or be inconsistent with similar provisions of Ch. 23741. An examination of the two acts indicates that the provisions thereof, concerning the times the registration books are open, are the same (§8 of both acts). It is not necessary in the consideration of the above-stated question to deal with the matter of which of these acts is applicable in Palm Beach County.

Palm Beach County operates under a permanent registration system established by Ch. 23741 or Ch. 23903. Under the two acts, the periods provided during which the registration books of the county are open for registration, are the same and such periods so prescribed are controlling in that county and should be observed by the above supervisor of registration. Section 98.011 does not apply in that county. Hence, the question is answered in the negative.

This opinion is conditioned upon the assumption that Chs. 23741 and 23903 were validly enacted by the Legislature.

December 21, 1951—051-480.

PRIMARY ELECTIONS—REGISTRATIONS—
INDEPENDENT VOTERS

QUESTION: May a person be registered as an independent elector for voting purposes in a primary election?

To: *Mrs. Dove C. Falls, Supervisor of Registration, Pasco County, Dade City, Florida:*

The section and chapter numbers below, unless otherwise indicated, are the revised and amended sections of Florida Statutes appearing in Ch. 26870, Laws of 1951.

Specifically, the inquiry is whether a person can register as an independent elector and vote the ticket of any political party participating in a regular primary election.

Pasco County, from whence comes this request, does not appear to have an act setting up a registration system peculiar to it. Hence, apparently the county is operating either under the permanent single registration system provided by §§98.041 to 98.151, both inclusive, or under the provisions of the sections of Ch. 98 other than those providing for the permanent single system.

Implicit in the above inquiry is this question: In Pasco County, would registration records which include names of voters without party affiliation (independents) be made available for the use of election boards at a regular primary election?

If the county has adopted the permanent single system authorized by §§98.041 to 98.151, the answer to that last stated question is in the affirmative; the system is a *single* one for use in all elections. However, let this be distinctly understood: No person registered as an independent voter may participate in a primary election. If the county *has not* adopted such permanent system, then the question stated in the preceding paragraph is not so easily answered.

Prior to the comprehensive amendment and revision of the election and registration laws of this state by Ch. 26870, the general laws of Florida with reference to registrations were as follows: (1) The permanent single system authorized by old Ch. 97, F. S., required to be adopted, with certain exceptions, by all counties by January 1, 1960, (2) Registrations for the general election as set forth in old Ch. 98, F. S., (3) Registrations for the primary election as provided in relevant sections of old Ch. 102, F. S. Thus, under the laws as they previously existed, in a county which had not adopted the permanent system set up by old Ch. 97, and which had no special system fixed by local or population acts, there were two sets of registration records—those for the primary election and those for the general election. Since registrations under the old laws for the primaries were for the benefit of party members to participate in the primary, properly an independent election was not eligible for registration in such records.

The situation now appears to be different. The permanent system formerly provided by old Ch. 97 now appears in Ch. 26870, as mentioned, as §§98.041 to 98.151, both inclusive. The amended,

revised and consolidated version of previous laws relating to registrations for general and primary elections now appear in the sections comprising Ch. 98 as included in Ch. 26870, except those sections setting up the permanent system.

The permanent system provided by §§98.041-98.151 must be adopted by January 1, 1960 (§98.041). Until same is adopted "the existing laws relating to registration of electors shall remain in full force and effect" (§98.151). "The existing laws" are those sections of Ch. 98 not related to the permanent system. While these "existing laws" are intended to provide only a method to be followed until adoption of the permanent system, in their consolidation and revision they apparently provide for a single system. Since it is a single system, records of that system available to election officials at the primary in all likelihood will include the names of registered independent electors (See §98.351).

In my opinion, your question is answered as follows: (1) If Pasco County has adopted the single permanent registration system provided by §§98.041-98.151, records available for use by primary election officials will include the names of registered independent voters. (2) If that county has not adopted such system, until it shall do so, registrations shall be in the registration books particularly identified in §98.351. Copies thereof available for primary election officials may include names of independent electors. (3) Regardless of which of these systems is presently applicable in Pasco County, under either an applicant for registration as an independent elector should be so registered by the supervisor. But in no event shall an independent elector vote in a primary election.

CANDIDATES, CAMPAIGN EXPENSES AND CONTESTING ELECTIONS

January 31, 1952—052-27.

JUSTICES OF PEACE—CANDIDATES—DISTRICTS —RESIDENCE QUALIFICATIONS

QUESTION: In order to qualify as a candidate for election to the office of Justice of the Peace must a person be a resident of the Justice of the Peace district for which he seeks election?

To: Honorable Arthur W. Newell, Clerk of the Circuit Court, Orlando, Florida:

In the absence of a constitutional or statutory provision, residence within the district over which the jurisdiction of the office extends is unnecessary to eligibility to hold the office, (67 C. J. S. page 128, §15). However, our Supreme Court has specifically stated that a Justice of the Peace must reside in the district which he serves (*Conyers v. State ex rel. Conroy*, 48 Fla. 417, 123 So. 817) and although the statement was dictum in the case, it has never been repudiated and would seem to be sufficient authority for its proposition. In addition, §114.01, F. S., gives weight to this rule, for it provides that if at any time the holder of any office ceases to be a resident of the State, *district*, county, town, or city for which he shall have been elected, that office will be deemed vacant.

Now, from the foregoing, must it be concluded that a person shall be a resident of the Justice of the Peace district for which he desires to be a candidate, prior to his actual election to that office? It seems certain that he must at least be a resident of the county of the district to which he seeks election, since every candidate for any office must swear on oath that he is a qualified elector of the state (§99.021, F. S.) and one of the qualifications of an elector is that the person be a resident of the county for six months. (§97.041, F. S.).

I have been unable to find any statutory or other organic requirement of law making it necessary for a candidate for the office of Justice of the Peace to be a resident of the particular district prior to his being actually elected to the office. The Constitution prescribes no qualifications for office, except for governor, senators, members of the house of representatives, and judges of the supreme and circuit courts. It is silent as to the qualifications of all other officers. Therefore it may well be questioned just what qualifications a person who seeks to be elected as one of these other officers swears to when he takes the oath under §99.021 (5), F. S., that "he is qualified under the laws of Florida to hold the office for which he desires to be nominated." However, as to the silence of our Constitution in this respect, the Supreme Court in *State ex rel Attorney General v. George*, 3 So. 81, said:

"We do not infer from this that the framers of the constitution were unmindful of the importance of having only such persons put into office as would be endowed with suitable qualifications. Our inference rather is that they deemed it best to leave that without rigid restriction trusting that those who were to have the selection of officers would take care that none but fit persons should be selected or appointed, — fit, not only in respect to capacity and character, but also in having citizenship to identify them in interest with the communities in which their official duties were to be performed . . . so that, as to all other officers, the people, in the absence of other requirements, are left to their own discretion, limited only by a common understanding, equivalent to law, that prohibits electing to office any person who is not in some wise a member of the body politic."

Nevertheless, in view of the above cited case of *Conyers v. State ex rel Conroy* and §114.01, F. S., it appears certain the person seeking the office of Justice of the Peace must be a bona fide resident of the district in which he seeks office, if elected, at least before his term in office begins.

It must be cautioned that this opinion in no way qualifies a person to become a candidate for Justice of the Peace in the primary election. Until such time as a proper court decrees that it is unnecessary for a person to reside in the Justice of the Peace district, for which he seeks office, prior to his qualifying for nomination for that office, I feel the safe and prudent course for the candidate to follow would be to limit his candidacy for Justice of Peace to the district of which he is a resident. Any other course would seem to invite attack upon the qualifications of the candidate.

March 3, 1952—052-64.

CLERKS CIRCUIT COURTS—CANDIDATE'S OATHS—
LOYALTY OATHS—PRESERVATION

QUESTION: For what period of time should the Clerks of the Circuit Court preserve the candidate's oaths and the loyalty oaths required to be executed by §§99.021 and 876.05, Laws of 1951, respectively?

To: *Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Ft. Lauderdale, Florida:*

Although §99.021 does not direct with whom the candidate's oath must be filed, nor does §876.05 state with whom the loyalty oaths required to be made by "all candidates for public office" shall be filed, §99.061 (3) requires that candidates for nomination to a county office "file their sworn statement . . . with . . . the clerk of the circuit court of the county . . ." While the wording of this section is in the singular, since §876.05 makes no provision as to the person with whom the loyalty oath is to be filed in the case of candidates for public office, it is reasonable to assume that the loyalty oath should be filed with the same official that the candidate's oath is to be filed.

Section 119.01, F. S., provides as follows:

"Public records open to examination by citizens.—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

It seems certain that the oaths in question herein would fall within the purview of the above statute and also within the definition of a public record made by our Supreme Court to the effect that a public record is "one required by law to be kept; or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done." *Amos v. Gunn*, 84 Fla. 285, 94 So. 615.

Assuming that the foregoing sufficiently warrants the conclusion that the candidate's oath and loyalty oath herein are "public records" and that, when made by certain candidates, both are to be filed with the clerk of the circuit court, the question arises as to whether such clerk has any discretion in keeping or ceasing to keep these or other public records. On the subject of removal or destruction of public records, 45 Am. Jur., p. 425, §12, provides the following very pertinent statement:

"Public records and documents are the property of the state and not of the individual who happens, at the moment, to have them in his possession; and when they are deposited in the place designated for them by law, there they must remain, and can be removed only under authority of an act of the legislature and in the manner and for the purpose designated by law. The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made." (Emphasis supplied.)

The above statement is, I believe, given implied support in this state by the provisions of §§28.30, 28.31, F. S., which gives the clerk of the circuit courts special permission to destroy certain records in order to make space available for the more efficient operation of the office, thus indicating that the clerks of the circuit courts must have legislative authority to destroy or cease to preserve and keep any public records. Therefore, until such time as authority from the legislature—the same source that required the oaths to be made—is given the clerks to destroy or cease to keep on record the oaths in question, I am of the opinion that they must be preserved and kept indefinitely.

November 2, 1951—051-394.

CANDIDATE'S OATH—CITIZENSHIP—QUALIFICATION REQUIREMENTS

QUESTIONS: Section 99.021, F. S., as revised and amended in Ch. 26870, Laws of 1951, in effect sets forth matters required to be sworn to by a candidate in connection with qualifying in a primary and then sets forth the form of such candidate's sworn statement. Among those things required by the statute with respect to which a candidate must make oath or affirmation is "that he voted for a majority of the nominees of the party of which he is a member at the last general election . . ." Approximately the same wording is set forth in said form. How is such quoted wording to be construed in relation to a party member seeking to qualify as a candidate in the primary:

- (1) Who failed to vote in the "last general election", although a duly qualified elector and party member at that time?
- (2) Who moved to this state from another state and became a citizen and a qualified elector subsequent to "the last general election" in this state?
- (3) Who is a citizen and resident of this state and who, subsequent to the last general election, became a qualified elector upon reaching his majority?

To: Honorable R. A. Gray, Secretary of State:

The request for opinion would seem to involve only the situation presented by the first question. However, a complete discussion requires consideration of the situations reflected in the second and third questions.

It is to be noted that the questions are concerned with party candidates. By reason of a provision in the oath required of a challenged voter (§101.111, F. S., as revised and amended in Ch. 26870, Laws of 1951), to the effect that "at the last general election I voted for a majority of the nominees of such party," the questions are of interest to electors as distinguished from candidates.

Among definitions set forth in §97.021, F. S., as revised and amended in Ch. 26870, Laws of 1951, is that of "general election," to the effect that "when used in this code" the words should be construed to mean "an election held on the first Tuesday after the first Monday in November in the even number of years, for the

purpose of voting on party nominees for national, state or county offices and for voting on constitutional amendments as proposed by the legislature." In view of this definition, the words "general election" as used in §99.021 are to be construed as referring to regular Florida general elections.

Political parties are essential to the functioning of the popular form of government exemplified in the American system on both the national and state levels. In *Kelso vs. Cook* (Ind.) 110 N.E. 987, the court quoted from 1 Bryce, *Am. Commonwealth*, 636: "But the spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a locomotive engine; or, to vary the simile, party association and organization are to the organs of government almost what the motor nerves are to the muscles, sinews and bones of the human body." Party loyalty requirements and tests, such as here dealt with, are essential to party existence; and they have been held valid by the courts. *Kelso vs. Cook*, *supra*; *State vs. Felton* (O.) 84 N.E. 85; *Lett vs. Dennis* (Ala.) 129 So. 33; *Mairs vs. Peters, et al.* (Fla.) 52 So. 2d 739. It is recognized that when a party member votes for party candidates in a general election he is evidencing loyalty to his party. Yet the chief purpose of such party loyalty test is to assure that persons not members of the party or ill disposed to the party shall not participate in party activities, including the party primary, and thus weaken or destroy party organization. (See former §102.29, F. S., setting forth the form of candidate's oath and the provisions thereof; *State v. Drexel* (Neb.) 105 N.W. 174; *Kelso v. Cook*, *supra*). Thus the quoted wording from §99.021 is to be construed in relation to the questions stated so as to meet this purpose, but within the limits of the terms of the mentioned law involved.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) The meaning of the words "last general election" appearing in the quoted portions of §99.021 normally presents no problem of construction. However, we are here concerned with a party loyalty test. It would be drastic indeed if failure of a party member for any reason to vote at the "last general election" would bar him from becoming a party candidate in the primary or bar him from voting as a party member in the primary. Such a construction as applied to a party member who failed to so vote at the last general election by reason of circumstances beyond his control could hardly be justified as a lawful exercise of the police power invoked for preservation of political parties, and would unjustly interfere with such a person's rights, including the right of franchise. In the absence of the law differentiating between causes for failure to vote, it must be considered in the light of its most unfavorable application. Thus, reasonably, as to a party member elector who failed to vote at the "last general election," the quoted wording is to be construed as meaning the last Florida general election at which the party member voted.

(2) The quoted words from §99.021 in relation to a party candidate or elector who has moved to this state from another state and who has become a citizen and a qualified elector subsequent to the "last general election", refer to the last Florida gen-

eral election. As mentioned above, we are limited by the terms of the statute involved; hence, as to such candidate, there is not involved a general election in the state of his previous domicile. In view of the purposes of this provision, the words are not construed as requiring such a person to go through a waiting period after he becomes a citizen and elector of Florida and to vote in a general election *before* he may in law become a member of a political party. As to such a candidate or elector, the quoted words are construed as not effective.

(3) A part of the answer to question (2) furnishes the answer to this question. Hence, as to the first-time voter here considered the quoted words are not effective.

October 2, 1951—051-343.

MUNICIPAL ELECTION—DENTIST AS CANDIDATE— TITLE "DR."—USE

QUESTION: The charter of the City of Key West, Florida (Ch. 23374, Laws of 1945) provides that elections in said municipality "shall be conducted, except as otherwise specifically provided under this Charter, under the rules and conditions prescribed by law, and subject to the general election laws of the State." A qualified candidate for the office of City Commissioner in the approaching election in said municipality is a dentist, who desires to have the abbreviation "Dr." affixed to his name on the ballot. Is it permissible under the general election laws of this state to have a ballot printed showing such a title prefixed to a candidate's name?

To: Honorable M. Ignatius Lester, City Attorney, Key West, Florida:

Chapter 26870, Laws of 1951, is a comprehensive amendment and revision of the general laws of this state relating to elections. Attention is directed to the reference in the 1945 act which is the Charter of the City of Key West, mentioned above. While this answer would be the same under the general election laws of this state as they existed in 1945 at the time of the passage of said act and as such laws exist now, it is well to designate the general election laws here applicable. Since the mentioned reference is a *general* one as distinguished from reference to a *particular* statute or statutes, according to what we understand is the better rule, the reference embraces not only the legislation referred to as it existed in 1945 but also subsequent amendments thereof. *Hecht vs. Shaw*, 112 Fla. 762, 151 So. 333; *Sutherland, Statutory Construction*, 3rd Ed. Vol. 2, Section 5208, page 550. Hence, we construe such reference in said Charter now to refer to the general election laws as revised and amended in Ch. 26870.

Mentions of candidates' names to be printed on election ballots in Ch. 26870 do not appear to contemplate descriptive matter. (For example, but not to the exclusion of other references, see §§99.041, 101.151 and 101.18, *Florida Statutes*, as revised and amended in Ch. 26870). In this state, a person's legal name is his christian and surname. *Carlton vs. Phelan*, 100 Fla. 1164, 131 So. 117; 29 C.J.S. §161, page 236. There would appear to be no objection to including the nickname of a candidate by which he is generally known with

his name on the ballot. (e.g. John H. (Jack) Smith). Descriptive matter, such as "Dr.", is not a part of a person's name; and use of any such descriptive matter is permissible only when two persons of the same name or whose names are so similar as to reasonably cause confusion, seek the same office. *State vs. Murphy*, 122 Ohio St. 620, 174 N. E. 252 (involving "M.D." in connection with a candidate's name on the ballot).

Hence, in the absence of court authority holding otherwise, or two candidates of the same or similar names, as above mentioned, the better position would seem to require that this question be answered in the negative; that is to say, that this candidate's name on the ballot should not be prefixed by the title "Dr."

March 25, 1952—052-106.

HOUSE OF REPRESENTATIVES—CANDIDATES— GROUP DESIGNATION

QUESTIONS: (1) Is a candidate for a seat in the House of Representatives, from a county which is entitled to two seats, properly qualified as a candidate for the office when his qualification papers fail to state whether he wishes to run in Group One or Group Two and when he does not indicate his wish prior to the qualifying deadline for the office?

(2) Is a candidate from the same county for the same office properly qualified when, his qualification papers not indicating his choice of groups, he informs by telegram before the qualifying deadline that he wishes to run in Group One?

To: *Honorable R. A. Gray, Secretary of State:*

Section 99.051, F. S., provides that: "When an office requires the nomination of more than one candidate, as many groups shall be numerically designated as there are vacancies to be filled by nomination, each candidate shall indicate the group in which he desires his name to appear on the ballot." Although this section, as revised by the 1951 legislative session, has been shortened, its purpose is still the same as that of §102.49, F. S., 1949, which provided at greater length that: "... each candidate for such office, in addition to the sworn statement required ... shall indicate therein the group in which he desires his name to appear on the ballot ..."

In view of the intent and purpose of §99.051, as evidenced above, it is my opinion that the questions should be answered as follows:

(1) Since the designation of the group in which the candidate wishes his name to appear is an integral part of his qualifying as a candidate for the office mentioned in the question, and since that designation was not made known prior to the qualifying deadline for the office sought, his qualification was not proper and his name should not appear on the ballot.

(2) Where the group designation, though omitted from the regularly submitted qualification papers, was

supplied by a telegraphed message prior to the qualifying deadline, I am not inclined to state that there is a fatal omission in the candidate's qualifying since it is not at all clear that the group designation must be a part of the candidate's oath.

January 11, 1952—052-9.

PUBLIC OFFICERS—COMPENSATION—FEES—FILING FEE—COMPUTATION RULE

QUESTIONS: How is the amount of the filing fee of a candidate for a fee office, as distinguished from a salaried office, determined in the following situations:

1. The office does not come into existence until someone is elected to fill it or an existent office has been vacant for a year or more prior to an election year.
2. The office, either because it was created by the last legislature or for any other reason, has been active and has received fees only during a portion of the year preceding an election year.
3. The office, though not vacant for any period during the year preceding the election year, has received no fees because the incumbent has not acted and has not charged any fees.

To: Honorable J. Alex Arnette, Clerk of the Circuit Court, Palm Beach County, West Palm Beach, Florida:

In spite of the many opinions rendered in evolving the present interpretation of \$99.031, I am not aware that any of them have considered the questions herein raised. They have, however, furnished sufficient precedent upon which to base the answers to the questions posed.

The three immediately following paragraphs are condensations of many Attorney General Opinions rendered over a period of many years. The rules stated have been consistently applied by me and my predecessors, and they have received the passive sanction of the legislature in that no action has been taken which requires a different construction of the law quoted above. (See A.G.O. 051-454, Dec. 13, 1951; Opinions 048-42 and 048-35, 1947-48 Biennial Report, p. 88 and p. 89; and references made therein to earlier opinions).

It has previously been the opinion of this office that when a fixed salary is set for an office, the filing fee shall be three per cent of the annual salary required to be paid during the first year following the installation of the successful candidate. That is, the salary which would be determinative of the amount of the filing fee would be the salary received by the incumbent during the year in which he took office.

For an office which received its compensation in the form of fees rather than salary it has been the opinion of this Attorney General and his predecessors that the net amount of the fees accruing to the incumbent of the office for the year immediately preceding the election year would be used as the basis for determining the filing fee of candidates for nomination to such office.

It was also the opinion of my immediate predecessor in office that a candidate for a fee office which was not vacant during the year preceding an election year, but which charged no fees and received no compensation, should not be required to pay any filing fee.

The early seizure upon the net office receipts for the year preceding the election year as the basis from which to determine the annual salary of a fee office was obviously because the receipts of that year were the best measure of the financial possibilities of the office during the first year of a newly elected officer's term. The receipts for the election year would be a less adequate base since their total would not be available, perhaps, until after the successful candidate took office. The choice of the year preceding the election year as the best criterion upon which to estimate the future income of a fee office does not appear to preclude the use of other means of estimating the future income of a fee office. (1947-48 Biennial Report, p. 88)

(1) When a newly created office has collected no fees prior to the time when a candidate for the office is required to pay his filing fee, an estimate shall be made of the probable income of the office for the coming year. In making the estimate any evidence may be used which is reasonably calculated to reflect the approximate volume of the fees which may be collected by the new office during its first year of operation. The method indicated will be used also in instances where any office has been vacant for a longer period preceding the election year than twelve months.

(2) If the fee office has been operating for any portion of the year preceding the election year, or any portion of the election year itself, then the net fee receipts of those months, to the extent that they may be ascertained, and to the extent that they are indicative of the average month's receipts throughout the next year, will be used to approximate the income of the office for the year following the election year. In using the months immediately following the creation of an office as a basis, it must be observed that the volume of the receipts during those months may be considerably greater than in later months. Other evidence, as indicated in (1) above, should be used if it appears that the use of the receipts of the early months following the creation of the office will not lead to a fairly accurate determination of the total receipts for the year following the election year.

(3) If the office has an incumbent and has been in existence for at least one year prior to the election year, and if there have been no fees charged or collected during such time, then no filing fee shall be paid. This latter is a reiteration of a previous Attorney General Opinion, page 90, Biennial Report of the Attorney General, 1947-48.

January 21, 1952—052-14.

CANDIDATES—FILING FEES—DISPOSITION

QUESTION: What is the proper disposition of the 3% filing

fee required by §99.061, Election Code of 1951, to be paid by certain candidates to the Secretary of State?

To: Honorable R. A. Gray, Secretary of State:

In so far as I am able to ascertain this question has not been previously submitted for the opinion of an Attorney General. Nor am I aware that there is any provision in the Election Code which requires any particular disposition for this filing fee.

It is my understanding that in the past the Secretary of State has paid into the State Treasury all filing fees required to be paid to him. This practice, it appears, has been adhered to even in those instances where a candidate, though required to pay his filing fee to the Secretary of State, was voted for only in one county. All monies which were received by Circuit Court clerks by way of candidates' filing fees became funds of the county.

The law which required candidates for representative to the House of Representatives to qualify with and pay their filing fees to the Clerk of the Court of the county in which they were running was changed by the last legislature to the extent that such candidates are now required to qualify with and pay their filing fees to the Secretary of State. Section 99.061 (1), Election Code of 1951. Previous sessions of the legislature had changed the law so that candidates for offices of Circuit Court Judge, County Solicitor, and other state offices, even though to be voted on in only one county, should qualify with and pay filing fees to the Secretary of State.

The trend indicated by these changes of the law appears to reflect a legislative intent that all candidates for state office should qualify with the Secretary of State and that all candidates for county office should qualify in the counties in which they aspire to hold office.

All funds which are received as filing fees from candidates required to qualify with the Secretary of State shall become state funds and shall be remitted to the state treasurer in the same manner as has been the practice of the Secretary of State for such funds in the past, unless otherwise expressly provided by statute. The preceding statement shall not be affected by the fact that candidates for some offices which are to be voted on in only one county may appear to be county officers and hence seem to owe their filing fees to the county rather than the state. For the purposes of §99.061, Election Code of 1951, those candidates mentioned in subsections (1) and (2) thereof should be considered candidates for state offices and should pay their filing fees to the Secretary of State who in turn should pay the sums over to the state treasury. Those candidates with the intendment of subsection (3) are, for the purposes of §99.061, candidates for county office, and their filing fees should become county funds.

April 1, 1952—052-113.

DEMOCRATIC NATIONAL CONVENTION—DELEGATE CANDIDATE—QUALIFYING DEADLINE

QUESTION: Is the Secretary of State authorized to accept the filing fee, committee assessment, and qualifying oath of a can-

didate for delegate from the state at large to the Democratic National Convention who presents same at 20 minutes after 12 o'clock, noon, March 15 of an election year?

To: Honorable R. A. Gray, Secretary of State:

Although §99.102, F.S., requires that candidates for nomination to the office of delegate to a national convention file a qualification oath and pay a filing fee to the Secretary of State, no mention is made therein of the final day for paying such fee in order that a candidate's name shall appear on the ballot. The qualifying deadline for any state or county office which is not specifically excepted is provided by §99.061 (2) and (3). The date set therein is March 15 of any year in which a primary election is held.

While the office of delegate to a party's national convention is not a state or county office (*State v. Gray*, 124 Fla. 530, 169 So. 37), it is evident that the legislature intended to provide in the Election Code a qualifying deadline for all persons who wished to have their names appear on the primary election ballots as candidates for any office or position which may legally appear on the ballot. To argue that the legislature did not so intend is to arrive at a circumstance in which all provisions for the preparation of ballots are rendered ineffectual and unreliable.

Hence, it may be said that the March 15 deadline is the one which is applicable to candidates for any office or position which is allowed by law to appear on the first or second primary election ballots, unless by some general, special or local act candidates for a particular office are excepted and another qualifying deadline specified.

In view of the above considerations, it is my opinion that a candidate for delegate from the state at large to the Democratic National Convention is not properly qualified and that his name should not appear on the ballot when he files his candidate's oath and pays his filing fee after noon, March 15, of any year in which a primary is held.

January 23, 1952—052-16.

COUNTY COURT—JUDGE—PROSECUTING ATTORNEY— CANDIDATES—FILING DATE

QUESTION: What is the proper filing date for candidates for the offices of judge and prosecuting attorney of the county court in a county which has such a court?

To: Honorable R. A. Gray, Secretary of State:

The answer to this question depends upon whether §99.071, Election Code of 1951, applies to the judge and prosecuting attorney of a county court.

I think that the very terms of said statute exclude from its operation candidates for judge and prosecuting attorney of a county court.

Said statute applies to no candidate for the office of judge unless he is "A candidate for nomination . . . for the office of judge . . ." which he wishes to hold. No candidate is ever nominated for

the office of judge of the county court. The county judge is ex officio judge of the county court (Art. V, §18, Constitution of Florida). A man may be a candidate for nomination for the office of county judge and, if he is elected, he performs the duties of judge of the county court in a county which has such a court, but he is not, and cannot be, a candidate for nomination for the *office of judge of the county court*. Since there never is any candidate for nomination for the office of judge of the county court, said statute obviously does not apply to one who seeks to be the ex officio judge of that court by running for the office of county judge, which is a constitutional office.

Nor is a candidate for the office of prosecuting attorney of a county court governed by said statute. Said statute deals with no office of prosecuting attorney except that of "solicitor." Nowhere in the Constitution or statutes do we find the prosecuting attorney of a county court referred to as a "solicitor." Article V, §18, of the Constitution provides that in counties having county courts there shall be a "Prosecuting Attorney for said county . . .". Sections 34.10-34.16, F.S., deal with the prosecuting attorney for the county court but do not call him "solicitor." The only "solicitor" provided for by law is the "county solicitor" in counties having Criminal Courts of Record and in Escambia County, which has a constitutional Court of Record. (See Art. V, §§24-31, 39 and 47; §§32.16 and 43.01, F.S.). Since said §99.071 does not apply to any prosecuting attorney except a "solicitor," and since the prosecuting attorney for a county court is not by law designated a "solicitor," said statute does not apply to candidates for the office of prosecuting attorney for a county court. This conclusion is supported by the fact that this statute is an exception to the general rule set up by §99.061, and therefore requires strict construction.

I think that candidates for county judge in a county having a county court, as well as candidates for prosecuting attorney of such a court, are governed by the provisions of §99.061, Election Code of 1951, which provides that candidates for nomination to a county office shall file and otherwise qualify with the clerk of the board of county commissioners not later than noon March fifteenth of the year in which any primary is held.

However, in view of the fact that all of the county courts in Florida are created by special legislative acts, and in view of the fact that the courts might give to the word "solicitor" such a liberal interpretation as to cause it to include prosecuting attorneys for county courts, my suggestion is that candidates for nomination for prosecuting attorney of a county court would do well to comply with §99.071, and thereby avoid the possibility of being disqualified in case the courts should interpret "solicitor" more broadly than I do.

November 19, 1951—051-417.

PARTY CANDIDATES—COUNTY JUDGES—NOMINATION— QUALIFICATION TIME

QUESTION: What is the proper qualifying date for party candidates for nomination for the office of county judge in the 1952 primaries in those counties where such officer also acts as judge of

the juvenile court or as judge of the small claims court or of both said courts?

To: Honorable D. R. Smith, County Judge, Marion County, Ocala, Florida:

A reasonable construction of the request for opinion would seem to indicate that the above question specifically is related to Ch. 26880, Laws of 1951, concerning juvenile courts, their powers, jurisdiction, etc., and to Ch. 26920, Laws of 1951, establishing and authorizing the activation of small claims courts in the several counties.

Section 39.01 (1), F.S., as amended in Ch. 26880, provides in effect that the "juvenile court" as contemplated in said chapter "means the county judge's court in every county in which no separate juvenile court is established . . ."

Section 4 of Ch. 26920 provides in effect for the appointment by the Governor of a judge of a small claims court upon its activation in a county in pursuance of the provisions of said chapter, and for the election of such a judge to a four-year term of office at the succeeding general election. Chapter 26920 does not provide that the judge of such a small claims court shall be the county judge of the county. The legislative authority for the creation of such courts derives from Art. V, §1, Florida Constitution. The office of judge of such court is an "office under the government of this State," as such words are used in Art. XVI, §15, Florida Constitution. Since it appears that one person properly may not at the same time be elected to and hold the offices of county judge and judge of a small claims court created by Ch. 26920, no time is here spent dealing with the question of one person seeking nomination to both said offices in the primaries.

While, as mentioned above, it appears that the official to whom this is addressed had in mind small claims courts authorized under Ch. 26920, attention is directed to certain of our counties in which such courts have been established by laws particularly applicable to the respective counties or by population acts, each providing in effect that the county judge shall be judge of the small claims court created. Examples of these laws and counties involved are as follows: Baker, Ch. 27198; Bradford, Ch. 27257; Calhoun, Ch. 26508; Charlotte, Ch. 26696; Citrus, Ch. 26861; Columbia, Ch. 26694; Gulf, Ch. 26641; Hamilton, Ch. 27109; Hardee, Ch. 27340; Hernando, Ch. 27335; Holmes, Ch. 27305; Lafayette, Ch. 27293; Madison, Ch. 27271; Santa Rosa, Ch. 27291; Suwannee, Ch. 26862; Washington, Ch. 27245. The legal propriety of the county judge being designated as judge of a small claims court so created is not here questioned; and for the purpose of this opinion, all such laws, including those which are population acts, are assumed to be valid.

It is to be observed from the above that in those counties in which no separate juvenile court is established the county judge is, in effect, ex officio judge of the juvenile court; and that in those counties mentioned in the preceding paragraph, and possibly other counties with similar legislation, the county judge is, in effect, ex officio judge of the small claims court. With this explanation, the above question presented is simplified: What provision of "the

Election Code of 1951" (Ch. 26870) controls with respect to the time within which a person may qualify as a party candidate for nomination for the office of county judge in the 1952 primaries?

Section 99.061 (1) and (2), F.S., as revised and amended in Ch. 26870, Laws of 1951, relate to the qualifying of candidates in the primary for nomination to specifically describe state offices and "all other candidates for state offices." Said §99.061 (3) provides that candidates for nomination to county office shall file their sworn statement and receipt for party assessment, if any has been levied, with and pay the filing fee to the clerk of the circuit court of the county, who shall receive same in his capacity as clerk of the board of county commissioners of said county, not later than noon March 15 of the year in which any primary is held.

Section 99.071, F.S., as revised and amended in Ch. 26870, provides that "A candidate for nomination by a political party for the office of judge or solicitor of any inferior court *created with jurisdiction wholly within the county by special legislative act* is classified as a county officer and is required to file a sworn statement and pay a filing fee to the clerk of the circuit court in the county where the court exists not later than noon February first prior to the first primary election."

A county judge is a constitutional officer. Our Constitution defines the jurisdiction of county courts, designates the county judge as the judge of such court, and provides for the organization of such courts in counties as the legislature may think proper. (Art. V, §§16, 17 and 18, Florida Constitution). While it is true that county courts are created by acts of the legislature pursuant to the constitutional provision mentioned, the office of county judge does not depend upon the creation of such a court for its existence; hence, when such a court has been created in a county by special legislative act, the county judge of that county does not become the judge of an "inferior court" within the meaning of §99.071.

It would appear that for election purposes the office of county judge is to be considered a county office. Above mentioned §16 of Art. V of our Constitution provides for the election of a county judge "at the time and place of voting for *other* county officers." The above mentioned §18 of Art. V provides that "the first election for *County Judge*, Clerk of the Circuit Court, Sheriff, Tax Collector . . . and *other elective County Officers* shall be at the general election in 1888." This conclusion that the county judge is a county officer appears to be supported by the holding of our court in *Pelaez v. State*, 107 Fla. 50, 144 So. 364, to the effect that the prosecuting attorney or county solicitor of a criminal court of record created in pursuance of the constitution is a county officer.

Section 99.061 (3), F.S., as revised and amended in Ch. 26870, Laws of 1951, controls with respect to persons qualifying as party candidates for nomination to the office of county judge in the primaries, regardless of whether in the particular county the county judge is in effect ex officio judge of the juvenile court or ex officio judge of a small claims court or of both said courts. Hence, such a candidate shall qualify in the 1952 primaries with the clerk of the circuit court of his county by noon, March 15, 1952.

January 28, 1952—052-22.

CANDIDATES—SUPPORTERS—CONTRIBUTIONS—
PERSONAL SERVICES

QUESTIONS: 1. May a candidate for public office request and accept the personal services of his friends and supporters without violating any of the provisions of the Election Code of 1951?

2. If question (1) is answered in the affirmative, what are the personal services which may be performed in the furtherance of a person's candidacy?

3. What expenses may a candidate's supporters incur in the performance of the personal services which they wish to contribute without violating the provisions of the Election Code of 1951?

To: Honorable Lovick P. Williams, Prosecuting Attorney, Citrus County, Inverness, Florida:

Section 104.061 (2), Election Code of 1951, provides in part that, "... No person in the furtherance of or in opposition to the candidacy of any person for nomination or election in any election shall give or promise to give, pay, loan, expend or contribute any money or other thing of value for any proposition whatsoever; provided *personal services and personal traveling expenses may be contributed*, and provided further that campaign contributions may be made to a candidate direct or to his campaign manager . . ." (Emphasis supplied.)

Although §99.161 (4) and the quoted portion of §104.061 provide almost identical prohibitions, and even though §99.161 does not contain words of similar import to those of the proviso in §104.161 (2), it appears that there is a sufficiently substantial basis for assuming that the legislature intended that the emphasized clause of §104.061 (2) should provide an exception to the provisions of both §§104.061 (2) and 99.161 (4) (a). There is no substantial basis upon which it may be said that the legislature intended that either section should impliedly repeal the other.

Due to the proximity of the time at which these measures appeared before the legislature, as evidenced by the above information, it must be assumed that the legislature knew of the effect of both chapters, intended that they should operate concurrently and intended that neither should by any means abrogate the effectiveness of the other.

In view of the foregoing, it is my opinion that the questions set forth herein should be answered as follows:

(1) A candidate for public office may accept the personal services of his friends and supporters and employ them in the furtherance of his candidacy provided no provisions of the law in regard to the conduct of elections or political campaigns are violated by the method in which the personal services are employed. Such a contribution of personal services does not come within the prohibition of §99.161 (2). Nor may the expenses of

transportation necessary to the performance of those personal services be included in the prohibition of §99.161 (2). Those travel expenses which are incurred by a person in performing personal services for a candidate are not to be considered in determining whether the person has exceeded the \$1,000 limit set by §99.161 (2), since it is permissible to donate them directly to the candidate and since they are necessary incidents of the personal service.

(2) The personal services which are contemplated by §104.061 (2) are those services which an individual may personally perform on behalf of the candidate without the expenditure of anything of value except the time and energies of the person and the money necessary to defray the traveling expenses of the person donating his personal services. The services intended are those which a person may perform through the sole expenditure of his own physical and mental efforts, such as, preparing and distributing campaign literature, speaking on behalf of a candidate, and driving his own private automobile. The latter service is allowed only in that the traveling expenses of the driver, the person donating his personal services, are also allowed to be contributed.

(3) No other expenses, except those incurred in the traveling of an individual who has donated his personal services, may be incurred by any person in the furtherance of any other person's candidacy for public office, unless such expenses are those authorized and permitted by §99.172, Election Code of 1951, and unless they are in all other ways treated in the manner prescribed by the Election Code.

February 15, 1952—052-40.

CONTRIBUTIONS—RADIO AND TELEVISION

QUESTIONS: 1. Does the permission, by §99.172 (15), F. S., of expenditures by a candidate for "radio time" authorize expenditure for "television"?

2. Is the election of a candidate subject to contest upon the grounds that the candidate accepted contributions from sources within the class prohibited by §99.161, F. S., from making contributions to political campaigns?

3. If question number two is answered in the affirmative, how far does the duty of a candidate to police contributions extend?

4. If the election is subject to contest upon the grounds stated in question two, may the candidate protect himself by requiring his contributors to sign a statement to the effect that they are not within the prohibited classes?

To: Honorable R. A. Gray, Secretary of State:

In *State et al v. City of Jacksonville*, 50 So. 2d 532, the Supreme Court of Florida was faced with the question of whether a 1925 statute authorizing the City of Jacksonville to acquire, construct, own and operate "radio broadcasting stations" was broad enough to cover a proposed television station. The trial court had

found that television was a new phase of radio broadcasting, and in affirming the decision of the trial court it was said:

"While the general rule is that the words of a statute should ordinarily be taken in the sense in which they were understood at the time the statute was enacted, the rule is subject to the well-accepted qualification that where the statute to be construed is couched in broad, general and comprehensive terms and is prospective in nature, it may be held to apply to new situations, cases, conditions, things, subjects, methods, persons or entities coming into existence since the enactment of the statute; provided they are in the same general class as those treated in the statute, can reasonably be said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating an intention that they should not be brought within its terms . . ."

The authorization of expenditures for radio in political campaigns resulted from an amendment to Ch. 6470, Laws of 1913, by Ch. 19617, Laws of 1939. It is to be observed that the growth of television began during World War II and its commercial growth came afterward. It appears then, that the principle announced in *State et al v. City of Jacksonville*, supra, would be applicable to the statute in question. There is no apparent reason why the legislature may be said to have intended an authorization of expenditures for radio and an exclusion of such expenditures for television.

Accordingly, question number one is answered in the affirmative.

Question number two presents a problem difficult of determination. While it is true that §99.161, F. S., contains no express provisions which would seem to prohibit a candidate from accepting contributions from those within the prohibited classes, it is apparent that the intent of §99.161 is to preclude such contributions. It would appear, therefore, that should a candidate accept contributions from those within the prohibited classes he would be violating the clear intent of the law.

In addition, violation of the provisions of §99.161 is made a misdemeanor by §104.27, F. S. Since there are no accessories to a misdemeanor and all participants are deemed principals (See *State v. Davidson*, 139 So. 177, 178) it would seem that participation in a violation of §99.161 by acceptance of prohibited contributions would render the candidate guilty of a misdemeanor.

At this point it is worthy to note that §104.27 (2), F. S., provides a penalty in addition to the fine or imprisonment imposed by subsection (1), in that the nomination or election to office of a candidate who knowingly violates the provisions of §99.161, shall be automatically vacated. It may be argued then, that should a candidate participate in a violation of the provisions of §99.161, by accepting prohibited contributions, his nomination or election to office would be subject to vacation at proper suit, if not automatically vacated.

As opposed to the above construction is the principle requiring penal statutes to be strictly construed. This would seem to cast some doubt upon the question of whether the courts would construe the provisions in the manner mentioned above. Inasmuch as there are no adjudications upon the matter to serve as a guide, the most advisable procedure for adherence by a candidate would be a refusal of contributions from those known to be within the prohibited classes and an exercise of ordinary care that other contributors are not within the prohibited classes. It is my opinion that to do otherwise is to invite a contest of his nomination or election to office.

The second question is answered accordingly.

As to question number three, the observation is made that to place a requirement upon the candidate of exercising more than ordinary care would be a harsh and burdensome imposition. No standard of care is set up by the statute, therefore it is my opinion an exercise of such care as a reasonably prudent man would exercise should be sufficient.

In reference to question number four, I am unable to discover any provisions which would prohibit a candidate from requiring his contributors to sign a statement to the effect that they are not within the prohibited class. Such a provision, if it exists, would seem to be in the candidate's discretion. It is to be observed, however, that in the final analysis a determination of whether a candidate possessed knowledge that a contributor was within the prohibited class would turn upon the facts and circumstances surrounding the particular case and while such a statement might be of some aid it would not be conclusive in such a determination.

Question four is therefore answered in accord with the preceding paragraph.

February 21, 1952—052-49.

CANDIDATES—"HILLBILLY" BAND—EMPLOYMENT—EXPENSES

QUESTION: Is a candidate legally authorized under the Election Code to expend funds to employ a "hillbilly" band?

To: *Honorable Edgar W. Waybright, Sr., Chairman, Duval County Executive Committee, Jacksonville, Florida:*

It is assumed in this question that such band would be employed by the candidate in the customary way, that is, to provide entertainment at a political rally or speech until the planned political program gets underway and also to attract attention or give auditory publicity to the gathering.

Section 99.172, F. S., enumerating items of campaign expense allowed a candidate, includes: "(2) for his traveling expenses while campaigning". This clause, using the plural word "expenses" and the word "campaigning", when read in connection with the language of the entire section, must necessarily be interpreted in the light of contemporary understanding of the sub-

ject of modern political campaigning. It is patently not to be given the narrow interpretation of authorizing only the personal travel expense of the candidate himself. Instead it necessarily requires a realistic construction, authorizing expenditures by the candidate for those necessary and usual things that are integral components of the entourage of a candidate conducting a modern campaign.

A traditional adjunct of many a candidate in his campaign forays on the highways, byways and streets of his district, county or state is his publicity or fanfare organ, the "hillbilly" band. Some candidates, particularly those in state-wide campaigns, would feel greatly handicapped without the accompaniment of such a band to lure the crowd.

If this harmless campaign aid were prohibited, campaigns would become drab affairs to many citizens, since with two or three notable exceptions, public campaign oratory on the hustings has lost most of its ancient appeal due to the competition of more diverting attractions. Consequently, campaigns need the supplementary ingredient of musical appeal to be more effective.

Under conditions so unfavorable to candidates in successfully competing for public attention, we cannot believe it was the intention of the 1951 Legislature to shear candidates of the accoutrements of "hillbilly" bands; anymore than we could rule that a candidate may not purchase "hillbilly" records and, as a part of his campaign programs, play them on his public address equipment which the statute specifically authorizes him to operate.

When the writer campaigned for office in 1948 it was to him a melancholy fact that the populace thrilled more to renditions of such "hillbilly" numbers on his record-player as "I Walk Alone", "Cattle Call" and "Anytime" by Eddy Arnold than to his campaign remarks calling attention to their need for his services. With this personal experience, due appreciation is here accorded the value of musical relief in making campaigning more bearable and entertaining to the public.

No, we cannot conscientiously construe the statute as intending to take the rhythm and melody of music out of Florida campaigning. The people are used to it and expect it. In some campaigns music was a veritable hallmark. Who, for example, recollecting campaigns of the past twenty years can forget the influence of music in the campaign of one who thereafter became known as "Old S'Wannee".

It is our opinion that a part of the ordinary and traditional traveling expense of campaigning is the cost of obtaining, transporting and presenting "hillbilly" bands.

March 5, 1952—052-65.

BEVERAGE LICENSEE—CONTRIBUTIONS TO OWN CAMPAIGN FUND

QUESTION: In view of the provisions of §99.161 (1) (b) may a candidate who holds a license for the sale of intoxicating beverages contribute to his own political campaign?

To: Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Ft. Lauderdale, Florida:

Section 99.161 (1) (b), F. S., provides in part that, "No person holding a license for the sale of intoxicating beverages . . . shall make, directly or indirectly, any contribution of any nature to . . . any candidate for . . . any political office in the State of Florida."

A reading of §99.161 as a whole does not reveal any intent that persons who hold licenses to sell intoxicating beverages should be, in effect, virtually denied the opportunity to seek public office at their own expense. Such would be the result of construing the quoted section as evidence of a legislative intent that such licensees should be prohibited from expending their own financial resources in the furtherance of their own candidacy. The legislature did not intend that the words ". . . contribution . . . to any candidate . . ." should be so construed as to prevent a person from incurring personal expense on behalf of his own candidacy.

It is, therefore, my opinion that your question should be answered as follows:

The holder of a license to sell intoxicating beverages is not prohibited by §99.161 (1) (b), F. S., from expending his own personal funds in the furtherance of his own candidacy for a political office in the State of Florida, provided his personal funds do not include monies which are indirect monetary contributions from any of those sources which are prohibited from contributing to political campaigns, candidates, or parties.

March 11, 1952—052-76.

CANDIDATES—ADVERTISING—CONTRIBUTIONS

QUESTIONS: (1) Should the expense incurred by an individual or individuals in giving a public function, such as a barbecue, fish-fry, or the like, at which a particular candidate for a state office is advertised and speaks as the guest of honor, be reported to the Secretary of State as a campaign contribution by that individual?

(2) Are donations to a candidate for a state office of sign space on buildings, campaign literature, headquarters' offices, food, beverages and campaign signs, such as must be reduced to a monetary value and reported to the Secretary of State as campaign contributions? If the answer is in the affirmative, how can a candidate or his treasurer calculate the value of such contribution?

(3) Is a candidate for a state office charged with the knowledge of signs advertising his candidacy which have not been requested or approved by the candidate or someone in his organization?

To: Honorable George C. McCaughan, Attorney, Miami, Dade County, Florida:

QUESTION ONE

With only a casual reading of isolated portions of the Election Code, it might appear that the giving of a public barbecue or fish-

fry in the furtherance of the candidacy of a candidate for public office is prohibited in that §99.161 (4) (a) when read in isolation from other provisions of the Election Code indicates that no person may expend money in the furtherance of one's candidacy unless the expenditure is made through the candidate's depository, and that an expenditure for barbecues, fish-frys, and the like is not authorized under §99.172.

Such a construction, however, would in my opinion misconstrue the intent of the Legislature and result in disallowing the use of a harmless traditional attraction which is the only means of drawing out many apathetic voters who would otherwise take no interest in political campaigns.

Looking at the pertinent provisions of the law as a whole, the purposes of §§99.161 and 99.172 are to prohibit certain persons and groups of persons from making any political contributions whatsoever; to prohibit the candidate himself from giving anything of value in furthering his candidacy; to prohibit any one person from contributing money or goods in an amount or value in excess of \$1,000; to provide a means of reporting and publicizing all contributions made to and all expenditures made by or for a candidate; and to limit expenditures to those necessary adjuncts of a political campaign which do not create any undue influence upon the voters.

The candidate would be prohibited from giving a barbecue or fish-fry himself and expending money from his depository for such purposes. By the same token, such a barbecue or fish-fry, paid for by others, but publicized or labeled as being given by the candidate as host, would also be prohibited as an indirect way of giving something of value on the part of the candidate to influence votes in his behalf. However, I do not believe that the law would prohibit private citizens, as the hosts, from giving such a function at their own expense and considering it as a contribution of a thing of value to the candidate where it clearly appears and is made known at the time that they are the hosts and the candidate is not. The candidate, being a guest and not the host at such an affair, is giving nothing himself which is prohibited by §99.172, and the person or persons giving the barbecue would not be influencing or procuring the votes of the guests as is prohibited by §104.061, since guests at such an affair would not in any real sense feel that the food is consideration for their vote. Certainly, it would seem that it could not have been intended by the Legislature that the strict limitations of §99.172 should by the implementation of §99.161, prohibit a private citizen from giving to a candidate and his friends a meal, the sole purpose of which is to bring the voters into closer contact with the candidate whom he favors.

The terms of §99.161 (2) and other provisions throughout that section clearly indicate that a candidate may accept contributions of things of value other than money. In my opinion the giving of a barbecue, fish-fry or dinner by a friend of a candidate would constitute a contribution of a thing of value in the furtherance of the candidate's campaign, when the candidate is invited to speak and is given the opportunity to contact the voters who attend such function. As such, the contribution must be authorized and reported by the candidate in the manner prescribed by §99.161. The

requirements of subsections (4) (a) and (7), that the contribution and expenditures in connection therewith be made through the campaign treasurer, would be satisfied by a letter or memorandum, signed by the candidate or his treasurer, authorizing the contributor to make such an expenditure, and accepting the barbecue or dinner as a contribution of a thing of value to be recorded and reported as such. No deposit into the campaign treasury of the necessary funds to pay the cost of the barbecue and subsequent order on such depository for the expenditure would be necessary under such circumstances, as the food and other ingredients for the dinner, fish-fry or barbecue would be purchased by the contributor and listed as a contribution of a thing of value.

It is therefore my opinion that a public function such as a barbecue, dinner or the like, may be contributed by an individual to a candidate for public office, and the expense which the individual incurs in giving the function should be listed as the value of the contribution. The candidate would then report such contribution as a thing of value, for example: "One fish-fry for 100 people, valued at \$200". The name and address of each person contributing to the affair would also be listed in the candidate's periodic report of contributions received. It is understood, of course, that the \$1,000 limit on any one person's total contribution would necessarily be applicable here.

QUESTION TWO

All of the items and services listed in question (2) may be contributed as things of value provided the candidate accepts them and authorizes their use, as outlined above; and provided further that food and beverages may not be given to the candidate and thereafter given by him to the public. However, a person other than the candidate may give the same under the conditions indicated in question (1). The value of these items and services would be based on the cost to the contributor, if ascertainable. Otherwise, the value would have to be based on the cost to the ordinary consumer.

QUESTION THREE

A candidate is not charged with the knowledge of what others do in his behalf without his authorization. His only duty, other than that of obeying the law applicable to him, is to use reasonable care in ascertaining that contributors to his campaign fund are not in a class prohibited from contributing and, if not, that they have not exceeded the \$1,000 limitation placed on them by §99.161 (2). (See opinion 052-40, dated February 15, 1952, copy enclosed).

It is recognized that the answers given above to questions (1) and (2) result in a somewhat different construction of §99.161 (4) (a) and (7) F.S., than that expressed in my opinion 051-437, dated November 30, 1951. In that prior opinion it was indicated that all funds expended by any person to further the candidacy of a candidate must be, in effect, turned over to the campaign treasurer and "disbursed by" such treasurer. After a careful re-examination of the purpose, intent and theory of this law, it is now my opinion that such things as food, beverages, (provided that food and beverages can only be contributed under the conditions and circum-

stances set forth in question (1) above, and never for the purpose of the candidate's giving the same as his own in order to promote his candidacy), literature, newspaper advertisements, and the like, may be purchased directly by a private individual, upon the prior written authorization of the campaign treasurer, and contributed to the candidate as "things of value" to be recorded and reported as such, without it necessarily being required that the funds for such expenditures be turned over to the treasurer and disbursed by him. Accordingly, to the extent that my opinion of November 30, 1951, is inconsistent with the views herein expressed, it is hereby modified.

This conclusion becomes necessary because §99.161 (2) and (4) F.S., clearly authorize contributions of "*other things of value*" besides money to a candidate. In practical effect it makes very little difference in the interpretation and enforcement of the Act that such "*other things of value*" may be contributed, so long as their acceptance is duly noted and reported along with money contributions by the campaign treasurer, and so long as their value as a contribution does not exceed \$1,000 as to any one individual.

March 28, 1952—052-111.

CANDIDATES—FAMILY'S NORMAL EXPENSES— CAMPAIGN CONTRIBUTIONS NOT ALLOWED

QUESTION: In view of the provisions of §§99.161 and 99.172, F. S., as revised and amended, may a candidate for nomination to public office in the primaries expend campaign contributions, or any part thereof, to defray ordinary living expenses of the candidate and his family during the time he is a candidate?

To: Honorable Thomas T. Cobb, Representative, Volusia County, Daytona Beach, Florida:

Section 99.161, F.S., as revised and amended deals with and controls the receipt, accounting for and disbursement of contributions to candidates for nomination or election to public office. Subsection (1) thereof prohibits contributions by certain classes of persons therein described "to any candidate for nomination for, or election to, political office in the State of Florida." Subsection (2) thereof provides that no person "shall contribute to a candidate for election or nomination to political office" moneys, etc., in excess of one thousand dollars in any primary or general election. Generally, the remainder of the section regulates the manner in which such contributions are received, expenditures made, and accounted for "in furtherance of the candidacy of any candidate."

Section 99.172 sets forth the purposes for which expenditures may be made "by a person in the furtherance of his candidacy for nomination for public office". Any such expenditure is unauthorized unless it falls within the wording or obvious intent of such purposes itemized in this section.

The ordinary living expenses of the family of a candidate and of the candidate at his place of residence, as distinguished from expenses of the candidate incurred while campaigning away from his place of residence, are not mentioned in §99.172 as expenses in furtherance of such a person's candidacy. Such family

living costs, which would accrue whether the person was a candidate or not, are not campaign expenses within the purview of the mentioned statutes. On the other hand, the contributions to a candidate as contemplated by §99.161 are those made to assist in his nomination or election, and in furtherance of his candidacy; and during such candidacy they may be expended only for the purposes set forth in §99.172.

A candidate for nomination in the primary, during the period of his candidacy, properly may not use contributions made to him under the circumstances and as contemplated by §99.161, for the ordinary living expenses of the family of the candidate, and of the candidate at his place of residence, as distinguished from expenses of the candidate while campaigning away from his place of residence.

It is remarked, however, that a donation or gift of funds made by a person for the sole and unquestioned purpose of assisting another who happens at the time to be a candidate, with his living expenses, and is not given as a subterfuge to circumvent §99.161 directly or indirectly, would not be a contribution as contemplated by said section.

April 16, 1952—052-127.

PRIMARY ELECTIONS—CANDIDATES—CAMPAIGN CONTRIBUTIONS—DEADLINE DATE

QUESTIONS: (1) Under the provisions of §99.161 (4) (b), F. S., what is the last day prior to the primary election which is to be held on May 6, 1952, that contributions to a candidate may be received and retained?

(2) Under the provisions of §99.161 (4) (b) and (5) F.S., within what time must such contributions received on the last day permitted before the primary to be held on May 6, 1952, be deposited?

To: *Honorable J. Wesley Fly, McCarty Campaign Treasurer, Orlando, Florida:*

Section 99.161 (4) (b) provides that any contribution received by the campaign treasurer or deputy treasurer "less than five days before the election" shall be returned by him to the person contributing it and shall not be used or expended in behalf of the candidate or in furtherance of his candidacy. Thus, it is apparent that any such contributions received *not less than five days before the election* may be retained by the candidate and used in furtherance of his candidacy.

A part of §99.161 (5) provides that all funds received in furtherance of the candidacy of any candidate shall, within twenty-four hours after receipt thereof (Sundays and holidays excepted) be deposited by the campaign treasurer or deputy campaign treasurer in the campaign fund in the campaign depository of the candidate.

In the matter of the computation of time, under circumstances here found, unless it is clearly the legislative intent, the period of time is not to be computed on the basis of intervening clear

days. On the other hand, we have here involved a period of time less than seven days with a Sunday included in those days. The fifth day before the primary to be held on May 6, 1952, is ascertained by counting back, starting with May 5, to the fifth day, excluding May 4 (Sunday) in the count. As authorities for this statement, see *State ex rel. Ashton v. Harris*, 115 Fla. 3, 155 So. 100; *Croissant v. DeSoto Improvement Co.*, 87 Fla. 530, 101 So. 37; *F.E.C. Ry. Co. v. George*, 91 Fla. 42, 107 So. 266.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) The last day upon which campaign contributions may be received and retained by a candidate before the primary election to be held on May 6, 1952, is April 30, 1952.

(2) Any contributions received on April 30, 1952, must be deposited not later than May 1, 1952.

April 30, 1952—052-141.

GENERAL ELECTION—CANDIDATES—CAMPAIGN CONTRIBUTIONS—REPORTS

QUESTIONS: 1. Is a party nominee who is opposed by the nominee of another party, required to make the campaign contribution and expenditure reports provided for in §99.161, F.S., during the time between his nomination and the date of the General Election?

2. If the answer to Question 1 is in the affirmative, when does the obligation to file the reports begin and when does it end?

To: Honorable W. A. Wynne, Clerk of the Circuit Court, Sarasota County, Sarasota, Florida:

Throughout §99.161, F. S., there is ample indication that the legislature intended for the provisions of the act as a whole to be applicable, in so far as the various subsections are pertinent, to "any candidate for nomination for, or election to, any political office in the State of Florida." In several instances it is apparent that the legislature intended that the campaign contribution and expenditure reports be made not only by candidates for nomination, but also by candidates for election. It is provided in §99.161 (8) (a) that the financial reports shall be made at certain designated intervals, "... between the date of the appointment of the campaign treasurer and the date of the election or elimination of the candidate..." There is a further indication of the same intent in the statement that certain reports shall be filed, "after each primary or election in which the candidate participates." (§99.161 (8) (a) (3).)

Section 99.161 (8) (e) is as follows: "Should any candidate be unopposed for nomination for, or election to, any office after the time prescribed by law for qualifying for the nomination or election, then the obligation to file the above reports shall cease."

The primary principle of statutory construction is to ascertain and give effect to the intent of the legislature as it is embodied in the language of the statute; the entire statute should be

considered and effect given to every part if it is possible to do so. (Axtel v. S. and R. Hardware Co., 59 Fla. 430, 52 So. 710; Davis v. Florida Power Co., 64 Fla. 246, 60 So. 759; Kozak v. Ake, 147 Fla. 508, 3 So. 2d. 120; Singleton v. Larson, (Fla.) 46 So. 2d. 186.)

When it appears that a literal construction of a certain portion of a statute results in an absurdity, or when there is evidence that a matter has been erroneously included, or erroneously designated, it is necessary that the intent of that portion of the statute, if it is at all ascertainable, should be ascertained by a consideration of the true meaning and intent of the entire statute. (Milam v. Davis, (Fla.) 123 So. 668.)

Observing the above rules of construction, it is evident that the Legislature intended that the various features of §99.161 should also be applicable to candidates for election, as distinguished from candidates for nomination. The difficulty in effectuating that intent has its origin in §99.161 (8) (e), the only part of the statute which gives any indication as to when, during the period between the primary and the general election, the obligation to make the reports begins and ends.

In a campaign for a primary nomination, when a candidate has no opposition, after the time for qualifying for the primary has passed, the candidate no longer has to make the periodic financial reports. In attempting to make the same rule applicable to a candidate for election, the Legislature overlooked the fact that there is no qualifying deadline for a general election which compares with the ones prescribed by law for primary elections. To literally construe subsection (8) (e) would be to require candidates to continue to make the reports until it should be ultimately impossible for him to have any opposition on the general election ballot, or perhaps, until the polls had closed, since there is a possibility of write-in opposition.

The absurdity of this literal construction is evident when it is observed that the legislature has recognized, in regard to unopposed primary candidates, that there is no need for the reports to be made when a candidate has no opposition, since, as a practical matter, there is rarely any need for the candidate to receive or expend any money to obtain a nomination which he has already assured. Applying the same reasoning to a general election, it is observed that, practically, there is no reason for a party nominee to receive or expend money to secure his election when his election is virtually assured. To all intents and purposes one's election is assured until the name of another nominee is certified to appear on the general election ballot. The purpose of the reports is to publicize all contributions and expenditures to the end that the power of money shall not be allowed to become the primary factor in overcoming opposition encountered in seeking a nomination or an election to an office. Even though the Legislature did not clearly and unambiguously provide the means for carrying out that purpose, there is an adequate indication of the legislative intent that candidates seeking election to an office at a general election, provided they have opposition, should file the financial reports at the intervals designated for the office they seek. Because the well-established rules of statutory construction require that a statute be construed so as to effectuate the

intent of the legislature, it is my opinion that the questions submitted should be answered as follows:

1. Every party candidate who is opposed in his contest for election to a political office in the State of Florida by the candidate of another political party is required to make and file the reports of contributions and expenditures in the manner provided by §99.161, and in all other respects, to abide by the applicable provisions of §99.161, just as though he were a candidate for a political party's nomination in a primary election.

2. Any candidate who has received his party's nomination for an office, whether or not he was opposed in seeking the nomination, shall continue, or resume, as the case may be, the filing of his financial reports upon the receipt by himself and the candidate of another political party of certificates of nomination as candidates for the same office. The obligation to file the reports will not commence until the candidates of two different parties have received certificates of nomination for the same office. Provided a candidate is opposed in seeking election, and is required to make financial reports, his obligation to make those reports shall not cease until he has made his final report fifteen days after the General Election.

May 2, 1952—052-144.

PRIMARY ELECTIONS—CANDIDATES—CAMPAIGN CONTRIBUTIONS

QUESTIONS: (1) Does §99.161 (4) (b), F. S., apply to the Second primary Election as well as the First primary Election?

(2) May candidates resume receiving contributions promptly after the First Primary Election if they are candidates in the Second Primary?

To: Honorable R. A. Gray, Secretary of State:

It has been my holding that the \$1,000 limitation upon contributions, provided by §99.161 (2), is a total limitation upon contributions applicable to both primary elections; in other words, that a person may contribute only a total of \$1,000 whether it be all at one time or part of that amount before the First Primary and the remainder before the Second Primary.

In line with this I have also assumed the position, though not expressed in an official opinion, that §99.161 (4) (b), F. S., is applicable to both the First and Second Primary Elections. In accord with the apparent legislative intent I now officially reaffirm that position.

Your first question is therefore answered in the affirmative.

It has also been my interpretation of the election laws that candidates may resume receiving contributions on the day following the First Primary Election and continue to receive such contributions until five days immediately preceding the Second Primary Election.

Question number two is accordingly answered in the affirmative.

May 23, 1952—052-160.

CANDIDATES' REPORTS—CAMPAIGN EXPENSES— CONTRIBUTIONS

QUESTION: Since the first Monday in September, 1952, is a legal holiday, should the candidates' reports of campaign expenses and contributions required to be filed under §99.161(8), F.S., to be filed on the following day, September 2nd?

To: Honorable Ted Cabot, Clerk Circuit Court, Broward County, Ft. Lauderdale, Florida:

The rule which appears to have been fixed in this state is that an act which is required by statute to be done within a certain period of time must be done within the time designated regardless of whether the last day of the period falls on Sunday, a legal holiday. *Simmons v. Hanne*, 50 Fla. 267, 39 So. 77, 7 Ann. Cas. 322; *Newsom v. State*, (Fla.) 54 So. 2d. 58.

A different rule has been promulgated by the Florida Supreme Court in Florida Common Law Rule 7, which is applicable only in situations involving civil procedure. Rule 7 requires that the act which is to be done within a certain period of time should be done within that time unless the last day falls on a Sunday or a legal holiday, in which event the act might be done on the next succeeding day which is not a Sunday or a holiday. It is to be noted, however, that this rule is applicable only in computing time prescribed or allowed by the Common Law Rules, by order of court and by statutes pertaining to judicial procedures.

Because of the long established rule for the computation of time which is set out in the cases referred to herein, it is my opinion that in the absence of a final judicial interpretation your question should be answered as follows:

When an act is unconditionally required by law to be done on a particular day of the month, it shall be done on that day regardless of whether it may be a Sunday or some other legal holiday. Your question is thus answered in the negative.

June 26, 1952—052-201.

TAMPA CHAMBER OF COMMERCE—ENTERTAINMENT— DEMOCRATIC LEGISLATIVE CAUCUS

QUESTION: Will the proposed entertainment of the traditional "Democratic Legislative Caucus" by the Tampa Chamber of Commerce violate §§99.161 (4) (a) or 104.091, F.S.?

To: Honorable James S. Moody, Representative, Hillsborough County, Plant City, Florida:

It is our understanding that the Tampa Chamber of Commerce biennially entertains Democratic legislative nominees, holdover members of the Legislature, State Officials, and other guests at a convention or meeting referred to as the "Democratic Legislative Caucus". It is unofficial and informal; and, while Democratic members or nominees of the House of Representatives and of the Senate hold separate meetings and discuss certain party or public questions

and take informal action thereon, none of these functions are official or obligatory. The meeting is also designed to give the incumbent legislators an opportunity to get acquainted with new members, to exchange ideas, and to enjoy the entertainment furnished by the Chamber of Commerce.

As to \$99.161 (4) (a), it is our opinion that said section is not applicable in the present situation, because it is not perceived how the expenditure of money or the furnishing of entertainment of the Tampa Chamber of Commerce for the "Legislative Caucus" would further the candidacy of any candidate.

However, as to \$104.091, the broad language of that section presents a more difficult problem. It bans corporate contributions to political parties, organizations, committees or individuals *for any political purpose whatsoever*.

In advising as to political contributions by incorporated organizations, attention is called to the fact that the latter statute has been construed by this office to be applicable to non-profit corporations. This conclusion is necessitated by the broad scope of the statute. Hence, it does not appear that the Chamber of Commerce of Tampa, if it is incorporated, could properly contribute to the "Democratic Legislative Caucus" unless the contribution was for a non-political purpose.

Therefore, the answer to your question necessarily depends on whether or not the proposed entertainment by the Tampa Chamber of Commerce is to be considered as being for a "political purpose". There seems to be no exact legal definition of what constitutes a political purpose, although it has been said that a political purpose is one which seeks to influence the exercise of a political right. Therefore, it seems that any effort to influence a citizen in the exercise of his vote in an election, or to influence the action of a public official in connection with his duties, or the "lobbying" for or against proposed legislation, and similar activities would fall within that category.

In order to determine whether any particular action is taken for a political purpose, it would appear that the intent of such action would be controlling. Therefore, if the intent of the Tampa Chamber of Commerce in providing the proposed entertainment is in any way to influence the members of the Legislature, or other State Officials, in the exercise of their official duties, such would necessarily be considered a political purpose.

However, it is our understanding from reliable information that the motivation of the Tampa Chamber of Commerce in providing the entertainment for the "Legislative Caucus" springs from the time-honored custom of cities and Chambers of Commerce feting and entertaining visiting political figures. Such would appear to be a purpose civic in nature and intended only to inculcate a spirit of good will toward the city through hospitality, in accord with a long standing practice of providing a biennial occasion prior to the legislative session for informal discussion and fellowship among Democratic legislators and nominees.

Accordingly, if the purposes proposed to be served by the Tampa Chamber of Commerce are those indicated herein, as we believe they are, and there is not involved in such activities any intent

to further any political candidacy, to promote legislation, or to "lobby", or there is not involved any other purpose which is normally recognized and understood to be political in nature, there would appear to be no violation of the above mentioned section of our law. If, on the other hand the true intent of the proposed entertainment is to serve, directly or indirectly, a political purpose of any corporation, then in view of the broad language of the statutes our answer would necessarily have to be different.

October 22, 1952—052-295.

GENERAL ELECTION—INDEPENDENT CANDIDATES— WRITE-IN-VOTES

QUESTIONS: 1. Must write-in, or independent candidates, not the nominees of a recognized political party, comply with §99.161, F.S., in the conduct of their campaigns for election by means of write-in votes at a general election?

2. May inked rubber stamps or gummed stickers be used to print or affix a write-in candidate's name to a general election ballot?

3. In a county where voting machines are used, what process should be followed when an illiterate or physically handicapped person presents himself to vote?

To: *Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida:*

The questions as set out above are answered in corresponding numerical order:

1. Section 99.011 defines the word candidate as meaning "... any person who has announced to any person, or to the public, that he is a candidate for a certain office." Section 99.161 is applicable to candidates, as above defined, for election or nomination to political office in this state. Thus, even though a person has not been nominated by a recognized political party, he must comply with §99.161, if he has announced his candidacy for election to a political office in this state.

2. Section 104.19, makes it unlawful for any person voting at any election "... to use stickers, rubber stamps, or carry into a voting booth any mechanical device, paper or memorandum other than the official ballot. In casting a write-in ballot the elector shall cast the same in his own handwriting or in the handwriting of an authorized person aiding him ..."

3. The proper steps for dealing with an illiterate or incapacitated voter are set out at length in §§101.48 and 101.52, F.S. Copies of both of these statutes are attached.

September 25, 1951—051-333.

CANDIDATES—CONTRIBUTIONS—CAMPAIGN TREASURER—REPORTS

QUESTIONS: 1. Under the provisions of §99.161, F.S., as set forth in Ch. 26870, Laws of 1951 (The Election Code of 1951), is a candidate or potential candidate in the general primaries re-

quired to appoint a campaign treasurer at any particular time except "prior to his qualification"?

2. Under said law, are campaign expense statements required to be filed with the Secretary of State (or Clerk of the Circuit Court, as the case may be) prior to appointment by such a candidate of a campaign treasurer?

To: Honorable R. A. Gray, Secretary of State:

Section numbers herein refer to certain revised and amended sections appearing in Ch. 26870.

Section 99.011 provides that, "The word 'candidate' shall mean any person who has announced to any person, or to the public, that he is a candidate for a certain office." The wording of this section is construed to mean that a person becomes a candidate for office when unqualifiedly, and for the purpose of letting it generally be known, he announces his candidacy to any person or the public. Under this construction, this would not include a person who has not so unqualifiedly announced his candidacy even though he is considering it and engages in activities including obtaining advice and information from others, bearing upon the matter of the decision he may make as to such candidacy.

The question refers to "candidate" and "potential candidate." As we construe the intent of the request for opinion, "candidate" is a person who has announced his candidacy in the manner contemplated by §99.011 and who later qualifies; and that "potential candidate" is a person who is considering announcing his candidacy, but has not done so unqualifiedly, as explained in the preceding paragraph. Hence, let it be understood that "potential candidates" are not "candidates" under §99.011; and this opinion may relate to them only to the extent set forth in paragraph (c) of the answer to the first question.

Sections 99.161 and 104.27 were Ch. 26819, Laws of 1951. The former of these sections contains provisions relating to contributions to candidates and the accounting for and expenditure of money by candidates, as more particularly explained. The latter named section sets forth penalties for violations of the provisions of the former.

Section 99.161 (1) prohibits the making of contributions by certain described persons to political parties and candidates for political office in this state. Subsection (2) of the section limits contributions by any individual to a candidate for election or nomination to political office, in money, materials, supplies or by way of loan, to an amount or value not in excess of \$1000 in any primary or general election.

Section 99.161 (3)-(8), inclusive, deal with the accounting for and expenditure of moneys of a candidate for nomination or election to political office and are briefly summarized as follows: the appointment of a campaign treasurer and deputies, and designation of a depository; the requirement that all funds of a candidate, including contributions received and expenditures made, shall be through the campaign treasurer or deputy campaign treasurer, and the limit of time before an election during which contributions may

not be received; deposit of contributions and statement of the campaign treasurer or deputy campaign treasurers; restriction of expenditures to amounts on deposit; written authorization of expenditures required; and reports of the candidate to his campaign treasurer and reports required to be filed by the latter. Section 99.161 (11) requires the Secretary of State to prescribe and approve certain described forms necessary to effectuate the purposes of the section. Subsections (9), (10) and (12) are not necessary to this discussion.

Those members of political parties who desire to qualify as candidates for nomination to public office must do so within the time, in the manner, and with the public officer, as described and set forth in §99.061. "Upon or before," and as a condition precedent to qualifying as such a candidate, the candidate "shall appoint one campaign treasurer and shall designate one campaign depository" (§99.161 (3)). When a person so qualifies, it is quite apparent that the provisions of §99.161 are applicable to him and his candidacy. There remains the question of whether the provisions of such section are or may be applicable to such a candidate *prior* to the date he qualifies.

A fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the particular act under consideration; and such intent is the essence of the law (*Burr v. F.E.C. Ry. Co.*, 77 Fla. 259, 81 So. 464; *State vs. Rose*, 97 Fla. 710, 122 So. 225; *Getzen vs. Sumter County*, 89 Fla. 45, 103 So. 104).

Section 99.161 (4) (a) provides: "No contribution or expenditure of money or other thing of value, nor obligation therefor, shall be made, received, or incurred, directly or indirectly, in furtherance of the candidacy of any candidate for political office in the State of Florida except through the duly appointed campaign treasurer or deputy campaign treasurer of the candidate." Attention is also directed to the first sentence of §99.161 (5): "All funds received in furtherance of the candidacy of any candidate shall, within twenty-four hours after receipt thereof (Sundays and holidays excepted), be deposited by the campaign treasurer or deputy campaign treasurers in a campaign depository of such candidate" in an account to be designated the "Campaign Fund" of the candidate.

We are here dealing with a new regulatory law which has not been construed by our courts. The penalty provisions for its violation, as set forth in §104.27, are so drastic in relation to a person's candidacy that, in the absence of court construction, extreme caution should be observed in arriving at the meaning and intent of its provisions. There may be those who consider that compliance with the provisions of §99.161 will be burdensome; nevertheless, it is recognized that the Legislature in enacting the law has sought to cure evils obvious to informed people.

In view of the foregoing, in my opinion the above questions properly are answered in their numbered order as follows:

(1) This question specifically is concerned with the time, under the provisions of §99.161, when a candidate for nomination in the regular primaries must appoint a campaign treasurer. The

section deals with contributions to candidates, prohibited and permitted, and the functions and duties of such a candidate and his campaign treasurer in relation to such contributions and the expenditure of funds in furtherance of the candidacy of said candidate. Hence it is that the question really involves the time when the provisions of §99.161 become effective in relation to a candidate in the primaries.

(a) At or before the time a person qualifies in the primaries he must appoint a campaign treasurer; hence, undoubtedly the provisions of §99.161 are applicable to such a candidate from the time he so qualified. The provisions of §99.161 are applicable to such a candidate prior to the time he qualifies under circumstances hereinafter set forth.

(b) Attention is directed to the above-quoted definition of "candidate" in §99.011. Reasonably it appears that the provisions of §99.161, including the appointment of a campaign treasurer, are applicable to such a candidate and his candidacy and must be observed and complied with *prior* to the time such person qualifies and from the time such person announces his candidacy, in the manner set forth in §99.011, upon the happening of either of the following: the acceptance of a contribution, expenditure of money or other thing of value, or incurring of any obligation, directly or indirectly in furtherance of such person's candidacy.

(c) In relation to one aspect of §99.161, the word "candidate" is not to be construed in the restricted sense of one who has announced for office, as set forth in §99.011, or who has qualified, if the evils to be corrected by this legislation are to be dealt with in pursuance of the legislative intent found in it. The provisions of §99.161 (and see particularly the above-quoted parts thereof) indicate the intent that money or other thing of value received, used or expended by a candidate in support of his candidacy must be within the permissive features of the section and must be "made, received or incurred" through the campaign treasurer or deputy campaign treasurers. Hence, reasonably it follows that a person, in support of his candidacy, may not have the use or benefit of: contributions received *prior* to such person's announcement of his candidacy, and not followed by the appointment of a campaign treasurer and a reporting and accounting for such contribution within the time and manner required by this section; all contributions prohibited by §99.161 (1) and (2) including such contributions received *prior* to such person's announcement of his candidacy; and materials, supplies or other things of value purchased or contracted for prior to such person's announcement of his candidacy and appointment of a campaign treasurer.

(2) Reports of expenditures made in behalf of a person's candidacy are required to be filed with the public officer and from time to time by the campaign treasurer in pursuance of §99.161, particularly subsection (8) thereof. Since there is no provision in the section for such reports to be made by the candidate, this question is answered in the negative. It is recognized of course that a candidate may designate himself as his campaign treasurer.

The penalty provisions of §104.27 may not be invoked unless a person "knowingly" violates any requirement of §99.161. It is rec-

ognized that certain persons in the state have announced their candidacy for party nomination to public office in the 1952 primaries. Certainly it is assumed without question that no person in this state in connection with his announced candidacy has "knowingly" violated the provisions of §99.161. However, it is recommended that all such persons and those who may hereafter announce their candidacies in such primaries should advise themselves of the provisions of §99.161, as construed herein. Forms to be used in connection with certain of the provisions of the section are to be prescribed by the Secretary of State (§99.161 (11)), and interested persons may obtain information from him in that connection.

October 3, 1951—051-345.

CANDIDATES—CONTRIBUTIONS—"PASSING THE HAT" —REPORTS

QUESTION: Under §99.161, F.S., as revised and amended in Ch. 26870, Laws of 1951 ("The Election Code of 1951"), may a candidate in the regular primary accept contributions to be used in furtherance of his candidacy, obtained by "passing the hat" on occasions when the candidate speaks, the amount contributed and name of each individual donor not being made known to the candidate?

To: *Mr. George Nicholas, South Miami, Florida, and all candidates:*

Section numbers herein refer to certain revised and amended sections of Florida Statutes appearing in Ch. 26870.

Section 99.161 deals generally with contributions to political parties and candidates, and the accounting for and expenditure of money by candidates, as detailed therein. Section 104.27 prescribes penalties for "knowingly violating the provisions of Section 99.161," one of such penalties being, in effect, that the nomination or election to office of a candidate who knowingly violates the provisions of §99.161, or whose campaign treasurer or deputy campaign treasurer knowingly violates said section, shall be vacated, and such nomination or office filled as in other cases of vacancy.

Subject to stated exceptions, a board of county commissioners may print on the general election ballot only the names of candidates nominated in the regular primary as certified by the Secretary of State or the Clerk of the Circuit Court, depending upon the office involved (§99.131). It is to be observed that neither of such named officers should so certify the name of such a candidate if they believe he or his campaign treasurer or deputy campaign treasurer, has "knowingly" violated any provision of §99.161. It is the consistent policy of this office not to give legal advice to individuals and not to give advice involving the duties of a public officer in the absence of such officer requesting advice. However, the above question involves the provisions of §99.161, and should be answered without delay for the convenience and information of candidates or potential candidates in the approaching regular primaries. Hence, this temporary departure from an established policy.

Certain provisions of §99.161 are relevant to the above question. Certain persons are prohibited from making contributions to a

candidate (subsection 1). No individual shall contribute in excess of \$1,000 to a candidate as here contemplated (subsection 2). Contributions to a candidate must be made through his campaign treasurer or deputy campaign treasurer and deposited in the account of the candidate in the designated depository within a stated period; and such a deposit must be accompanied by "a detailed statement showing the names and addresses of the persons contributing or providing the funds so deposited, together with a statement of the amount received from or provided by, each person" (subsections 4 and 5). In the reports required to be made by the campaign treasurer with the public officer with whom the candidate qualifies, there shall be set forth "names and addresses of each of the contributors and the amount contributed by each." (subsection 8). These are sufficient references to said statute.

In view of the particularity thus required by these provisions of §99.161 in relation to the acceptance, accounting for and reporting of contributions made to a candidate, the above question must be answered in the negative.

Of course, if each of such contributions is accompanied by the name of the donor and the amount contributed by such donor, and the contributions fall within none of the prohibitions in §99.161 (1) and (2), there would appear to be no objection to acceptance of such donations by a candidate.

November 13, 1951—051-405.

PUBLIC OFFICERS—CAMPAIGN CONTRIBUTIONS— EXPENSE REPORTS

QUESTIONS: 1. Where a person has been elected to the office of county commissioner, term thereof expiring on the first Tuesday after the first Monday in January, 1955, must he resign such office as a prerequisite to qualifying as a party candidate for nomination for the office of sheriff in the 1952 primaries?

2. When a person has publicly announced that he is a party candidate for nomination for public office in the 1952 primaries when must he begin to comply with the provisions of §99.161, F. S., as revised and amended in Ch. 26870, Laws of 1951?

To: Honorable Tony Salvino, Fort Lauderdale, Florida:

It is recognized, of course, that under the provisions of Art. XVI, §15, Florida Constitution, lawfully a person may not at the same time hold the public offices of county commissioner and sheriff. However, there appears to be no prohibition in our laws to a person now holding the office of county commissioner, term of which expires on the first Tuesday after the first Monday in January, 1955, announcing and qualifying as a party candidate for the office of sheriff in the 1952 primaries. If he is successful in such primaries and is elected to said office of sheriff in the 1952 general election, to avoid all confusion he should then resign his office of county commissioner. In all likelihood should he be elected to the office of sheriff, if he did not resign from the office of county commissioner but qualified and accepted a commission for the office of sheriff, that would constitute a vacating of the office of county commissioner theretofore held by him (See *In re Ad-*

visory Opinion to the Governor, 76 Fla. 417, 79 So. 874). If this person should be selected as the party nominee for sheriff in the 1952 primaries and then fail of election in the 1952 general election, or if he should fail to attain the party nomination for the office of sheriff in said primaries, his tenure of office as county commissioner would not be disturbed.

Section 99.161, F.S., as revised and amended in Ch. 26870, Laws of 1951, deals in detail with contributions to candidates, the handling and disbursement of campaign funds and reports in connection therewith. Section 104.27, F.S., as revised and amended in said Ch. 26870, prescribes penalties for violation of §99.161. On September 25, 1951, in our opinion 051-333 directed to Honorable R. A. Gray, Secretary of State, among other things, I dealt with this second question. Reference is made to such former opinion, copy of which is hereto attached.

November 28, 1951—051-431.

CANDIDATES—MOTION PICTURE PROJECT— USE OF PROCEEDS

STATEMENT AND QUESTIONS: 1. A citizen of Florida owns and operates throughout the state a free motion picture project, which is financed by merchants of the various communities where the shows are put on, the merchants being charged for having their names and products mentioned over the loud speaker system during the showing of the free pictures. This citizen intends to be a candidate for nomination for public office in the 1952 primaries. He intends to use the proceeds from the activity mentioned in connection with his campaign expenses, but does not anticipate any contributions from such purpose from any political groups, corporations or persons. In view of the foregoing:

(1) Is it apparent that the use of this person's proceeds derived from the source mentioned in connection with his campaign for nomination for public office in the 1952 primaries, offends any provision of the election laws of Florida?

(2) Granted that the answer to the first question is in the negative, under the provisions of our election laws, particularly §99.161, F.S., as revised and amended in Ch. 26870, Laws of 1951, when this person uses any such proceeds in connection with expenses of his campaign how should the same be reported?

To: Honorable D. S. Dansby, Orange County, Orlando, Florida:

From the information available to us it is assumed that the showing by this person of free movies in various communities paid for by local merchants who have their businesses and merchandise advertised over a public address system before, during or between shows, is a purely business enterprise engaged in by this person, netting him a sufficient sum to warrant him pursuing the activity. In other words, it is here assumed that the showing of such free movies in various communities of Florida is not merely a scheme conceived by this person to evade the provisions of §99.161 and receive donations from those prohibited sources mentioned in §99.161 (1) or perhaps receive donations in excess of those permit-

ted by any single individual as set forth in §99.161 (2). This opinion is conditioned upon such assumption.

Hence, so conditioned as set forth in the preceding paragraph, and viewing the activities of this person as a legitimate business enterprise, there does not appear to be any legal impediment to this person at such meetings and over the loud speaker available soliciting votes in behalf of his candidacy for nomination to the public office mentioned.

There is attached hereto copy of former opinion of this office numbered 051-333, dealing comprehensively with certain phases of §99.161. There is also attached hereto copy of our former opinion numbered 051-345 in which we held that when contributions are received by a candidate as the result of "passing the hat" at political meetings such may be used in connection with that person's campaign only if the donations received may be identified as to amount and as to the individual donors so that due report can be made concerning them. Attention is directed to these former opinions to avoid needless repetition here of matters therein set forth. There is also attached hereto a compilation of the election laws of Florida prepared by our Secretary of State and the Statutory Revision Department of this office.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) Conditioned as above set forth, it would seem that the proceeds to be received by this person in carrying on the business activity mentioned above fall in the same category as the proceeds derived by any person from any legitimate occupation or pursuit, and such may be used by this person in connection with his campaign for nomination for public office in the same manner that any candidate may use his own funds for that purpose. Hence, this question is answered in the negative.

(2) The provisions of §99.161, particularly subsections (3) - (8), thereof, set forth in detail the various things to be done and also reports to be made in connection with the disbursement of a candidate's funds in furtherance of his candidacy. The provisions of the subsections mentioned are so clear that it seems needless here to enumerate them. Reference is made to these subsections in the compilation of election laws mentioned above which is attached, for information and guidance in connection with the matters therein dealt with.

November 30, 1951—051-437.

**CANDIDATES—RIGHTS OF CITIZENS AND NEWSPAPERS
UNDER "ELECTION CODE OF 1951" TO EXPRESS AND
PUBLISH VIEWS FAVORABLE TO — POLITICAL AD-
VERTISEMENTS — RIGHTS OF EDITOR — FEDERAL
COMMUNICATION COMMISSION'S REGULATIONS**

QUESTIONS: 1. Does §99.161, F. S., as revised and amended in Ch. 26870, Acts of 1951, particularly subsections (4) (a) and (7) thereof, prohibit a citizen from expending his money or incurring his own expenses in connection with his personal views favorable to a candidate for nomination in a primary, published by

means of a paid advertisement in a newspaper or on the radio, if such citizen in the described activity is not connected directly or indirectly with such candidate or management of his candidacy?

2. If §99.161 conflicts with regulations of the Federal Communications Commission relating to the treatment of political candidates, which should prevail?

3. Does the Election Code of 1951, particularly §99.161 therein, repeal or alter provisions of former §875.37, F. S., which required newspaper political advertisements to be signed by the author thereof?

4. Section 99.161 (4) (a), F. S., as revised and amended in Ch. 26870, Laws of 1951, provides in part as follows:

"No ... thing of value ... shall be made ... in furtherance of the candidacy of any candidate for political office in the State of Florida except through the duly appointed campaign treasurer or deputy campaign treasurers of the candidate."

Does this provision of said law prohibit a newspaper editor from writing an editorial friendly to a certain candidate?

To: Honorable J. Kenneth Ballinger, Attorney at Law, Tallahassee, Florida:

Chapter 26870, Laws of 1951, is a comprehensive codification and revision of the registration and election laws of this state, designated therein as "The Election Code of 1951." Section 99.161 (6) as originally set forth in such chapter provided in effect that if Senate Bill No. 8 of the 1951 session became law, it should be substituted for said section. That bill became law (Ch. 26819, Laws of 1951); and that act, except the penalty provisions thereof, is now §99.161 of the election code. Generally, that section deals with contributions to candidates, expenditure of campaign funds, and the filing of reports in relation thereto.

Section 99.161 (4) (a) provides: "No contribution or expenditure of money or other thing of value, nor obligation therefor, shall be made, received or incurred, directly or indirectly, in furtherance of the candidacy of any candidate for political office in the State of Florida except through the duly appointed campaign treasurer or deputy campaign treasurers of the candidate."

A part of §99.161 (7) provides: "No expenses shall be incurred by any candidate for election or nomination to political office, or by any person, corporation, or association in his behalf, or in furtherance or aid of his candidacy, unless prior to the incurring of the expense a written order shall be made in and upon the form prescribed, and signed by the campaign treasurer of the candidate authorizing the expenditure, etc."

Section 104.37, F. S., as revised and included in Ch. 26870, provides: "All political advertisements and all campaign literature published or circulated prior to or on the day of any election shall be signed by the author thereof, and if the same is being published

and circulated by a club or committee, then it shall be signed by the chairman and secretary of such club or committee, and if such literature is in circular form it shall have upon it the name of the printer or publisher. All political advertisements appearing in newspapers shall be marked 'Paid advertisements'. Any person who publishes or circulates any campaign literature or advertisement in violation of this section shall, upon conviction, be guilty of a misdemeanor."

The right to vote in this state, essential as it is to the representative forms of governments under which we live (national and state) does not derive from the common law. *Taylor vs. Beckham*, 178 U.S. 548, 44 L. Ed. 1187. Except with respect to voting for representatives and senators in Congress (Paragraph 1, §2, Art. 1, and the XVII Amendment, U. S. Constitution) the right does not derive from the federal constitution, but from the constitution and statutes of the state. *Minor vs. Heppersett*, 21 Wall. 162, 22 L. Ed. 627; *U. S. vs. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588. It is recognized that Section 4, Article 4, U. S. Constitution, guarantees to the states a republican form of government; nevertheless, the enforcement of such right is not a judicial but a political function. *Taylor vs. Beckham*, *supra*; *Highlands Farm Dairy vs. Agnew*, 300 U.S. 608, 81 L. Ed. 385. Thus, this right to vote, implicit in a republican form of government, derives primarily from the state.

Primary elections in this state are a part of the general election processes. *Smith vs. Allwright*, 321 U.S. 649, 88 L. Ed. 937. It is within the power of our legislature in the interest of public welfare to regulate elections, including primary elections. *State vs. Carson*, 114 Fla. 451, 154 So. 150; *State vs. Tyler*, 100 Fla. 1112, 130 So. 721; 29 C.J.S. Sec. 111, pages 146-149; 18 Am. Jur., Sec. 147, page 276. Section 99.161 is a police regulation in the field of elections. The police power of the state is the exercise of the sovereign right of the state to enact laws for the protection of life, health, morals, comfort and general welfare. *State v. Knott*, 114 Fla. 120, 154 So. 143. The possession and enjoyment of all rights and property are subject to the police power. *State vs. Rose*, 97 Fla. 710, 122 So. 225. A law prescribing police regulations will not be declared unconstitutional unless it clearly and inevitably violates some provision or principle of organic law. *McNeil vs. Webeking*, 66 Fla. 407, 63 So. 728. For example, it has been held in courts of other jurisdictions that described police regulations under circumstances set forth in individual cases offended fundamental rights guaranteed under the federal or state constitutions, such as express and implied inhibitions of class legislation; the generally recognized existence and inviolability of inherent rights; equal protection and due process; the constitutionally declared purpose of government; the express guarantee of the right to vote; and constitutional guarantees of freedom of press, speech and assembly. See *Smith vs. Allwright*, *supra*; *U. S. vs. Classic*, 313 U.S. 299, 85 L. Ed. 1368; *Nixon vs. Herndon*, 273 U.S. 536, 71 L. Ed. 759; *De Walt vs. Bartley*, 146 Pa. 529, 24 A. 185; *State ex rel. McGrael vs. Phelps*, 144 Wis. 1, 128 N. W. 1041; *Hopper vs. Britt*, 203 N. Y. 144, 96 N. E. 371; *State ex rel. La Follette vs. Kohler*, 200 Wis. 518, 228 N. W. 895; *State vs. Pierce* (Wis.) 158 N. W. 696. Nevertheless, when there is a valid exercise of the police power, individual claims of infringement of constitutional rights by its operation must yield to the public interest served

by the regulation. *Bailey vs. Van Pelt*, 78 Fla. 337, 82 So. 789; *Southern Utilities Co. vs. City of Palatka*, 86 Fla. 583, 99 So. 236, affirmed, 268 U.S. 232, 69 L.Ed. 930.

The significance and value of the constitutional rights of freedom of speech and press are recognized. I and XIV Amendments, U.S. Constitution; §13, Declaration of Rights, Florida Constitution. The term "freedom of press" includes not only newspapers but leaflets, circulars, radio and motion pictures. *Martin vs. City of Struthers, Ohio*, 319 U.S. 141, 87 L.Ed. 1313; *Ex parte Walrod (Okla.)* 120 P. 2d. 783; *U.S. vs. Paramount Pictures*, 334 U.S. 131, 92 L.Ed. 1260. Generally it may be said that those who publish a newspaper and control its editorial policy have no greater right under these constitutional provisions than the individual citizen.

Search has been made among the cases of other jurisdictions for police regulations similar to the one here considered and court constructions thereof in relation to the individual citizen. The nearest approach to this question is found in the Wisconsin case of *State vs. Pierce, supra*. A law of that state sought to limit expenditure of funds in behalf of a candidate to the candidate's personal campaign committee or a party committee, except described permitted expenditures by a person or group of persons in their county. Pierce ignored this law and, in support of a candidate, spent money under circumstances described in the case in a county other than that of his residence. The court held that as applied to such an activity by a voter under the conditions involved, the law offended the provision of the Wisconsin Constitution guaranteeing to every person the right freely to speak and publish his sentiments on all subjects. See also *State vs. Jenkins (Neb.)* 122 N.W. 473, and *Ex parte Harrison (Mo.)* 110 S.W. 709.

The statement has been made that §99.161 (Ch. 26819) was taken from the New Jersey laws. The election laws of that state are found in Title 19, §§19:1-1 to 19:53-1, Revised Statutes of New Jersey, 1937; and the part of such laws dealing with campaign expenditures is Subtitle 12, §§19:39-1 to 19:44-6. Section 99.161 in its wording was not lifted bodily from any part of the New Jersey laws; however, there is a marked similarity between §99.161 (7) and §99:42-2 of the New Jersey Statutes, which section became a law in 1930. An examination of Sheppard's New Jersey Citations fails to evidence that any court of that state whose decisions would be reported in the citator has construed any part of said Subtitle 12 of the New Jersey statutes. Hence, it seems that no assistance with respect to above questions (1) and (4) is available from that state.

Section 99.161 is a valid police regulation as applied to candidates and those directly or indirectly in privity with them in connection with their candidacy. The purpose of the section is to regulate contributions and the disbursement of funds made in furtherance of a person's candidacy and detailed reports setting forth the source of such contributions and the disbursement of such funds. It is recognized that if individual electors, not connected directly or indirectly with a candidate or those associated with him in the management of his campaign, are permitted to expend money for advertisements in newspapers and time on the

radio in published views favorable to the candidacy of such a candidate, the controls prescribed by §99.161 with respect to the sources from which contributions may be accepted, the limit on individual contributions, the handling of contributions, the detailed manner in which the candidate's funds may be disbursed, and reports to be filed in connection therewith, would be stripped of their efficacy to a considerable degree.

It is not the policy of this office to pass upon the constitutionality of statutes. In view of the legislative intent apparent in §99.161 and the evil sought to be remedied by that police regulation, it would seem that under the wording of subsections (4) (a) and (7) of that law, if an elector, not connected directly or indirectly with a candidate or those managing his campaign, desires to insert paid advertising favorable to any candidate in a newspaper or publish like views on the radio, such may be done only if the sums required therefor are authorized to be expended and are disbursed by the campaign treasurer of the candidate in the manner prescribed in §99.161 (7). It is recognized, of course, that nothing short of a court adjudication can settle this question, which is a serious constitutional one, with any degree of finality.

1. In the absence of court construction of the law involved, the position is here assumed that expenditures made or expenses incurred by a citizen not connected directly or indirectly with a candidate or the management of his candidacy in connection with the publication of the citizen's views which are favorable to a candidate by means of a paid advertisement in a newspaper or on the radio are expenditures made or expenses incurred in the furtherance of aid of the candidacy of such candidate within the meaning of §99.161 (4) (a) and (7). Hence, any such expenditures made must be authorized by the campaign treasurer of the candidate and must be paid in pursuance of the procedure set forth in said subsection (7); and neither a newspaper nor a broadcasting company may lawfully accept any money from a citizen for the purposes and under the circumstances described in this question. Nothing in this answer is to be construed as limiting the full right of any citizen freely to express himself concerning any candidate, short of the expenditure of funds or incurring of expenses for such purpose.

2. Generally it may be said that rules and regulations of the Federal Communications Commission, promulgated within the limits of the regulatory powers vested in them by federal laws, take precedence over state legislation in the same field. However, the question of whether or not a federal regulation preempts a given field to an extent that there is no room for the exercise of the state police power in that field is often a very controversial one. Hence, in relation to §99.161, in the absence of a particular regulation of the Commission being pointed out, no attempt is here made to answer the question.

3. Former §875.37, F. S., has been carried forward into "The Election Code of 1951" in §104.37 thereof. Attention is directed to such last-named section quoted above. The context of such section would seem to furnish adequate answer to this question.

4. The words "thing of value" as used in §99.161 (4) (a), quoted above in this question, are to be read in relation to contri-

butions to a candidate as set forth in §99.161 (2): "monies, materials, supplies or by way of loan." An editorial favorable to a candidate appearing in a newspaper is not a "thing of value" as so construed. Hence, neither the quoted portion of §99.161 (4) (a) nor any other provision of "The Election Code of 1951" lawfully prohibits the editor of any newspaper in Florida from publishing therein an editorial friendly to any candidate for nomination for office in a primary election.

January 17, 1952—052-12.

CANDIDATES—CAMPAIGN LAPEL BUTTONS

QUESTION: Is a candidate's use or distribution of the customary campaign lapel button within the prohibition of §99.172, F. S., or otherwise prohibited by the new Election Code?

To: *Honorable R. A. Gray, Secretary of State:*

Election or primary campaign lapel buttons have been in common use for many years. It is a traditional type of election campaign publicity. It is comparable to the customary campaign card. The button has no intrinsic value; its only use is for campaign publicity. It is not a thing of value within the meaning of the election laws. It is my opinion that the use or distribution of such buttons does not violate §99.172 or other provision of the Statutes, and is permissible.

April 11, 1952—052-123.

CANDIDATES—PURCHASES—ADVERTISING SPACE— PUBLICATIONS—NEWSPAPERS

QUESTION: May candidates for political office purchase advertising in publications not regular newspapers, but in the nature of periodicals, bulletins, programs and other publications of a club or association?

To: *Mr. Joe Tobin, Publicity Committee, Knights of Columbus, Tampa, Florida:*

I want to state at the outset that while my office does not render opinions for other than public officials, this is a question which has been reappearing in my office, and due to the extreme public interest in the subject, I will make this answer public.

Section 99.172, F. S., specifies "newspaper advertising" as an authorized campaign expense. The construction placed upon this phrase is that the Legislature intended that "newspaper advertising" be a general term to include advertising in the nature of newspaper advertising. While there are no Florida cases construing this phrase, the following decisions of other courts are helpful in defining this phraseology.

United States v. Research Laboratories, C.C.A. Wash, 126 F. 2d 42, 45, "Printed Matter, such as a circular, may constitute 'advertising'"; and, "Advertising" includes publication by hand bills, signs, billboards, sound trucks and radio." Rust v. Missouri Dental Board, 348 Mo. 616, 155 S. W. 2d 80, 83; "A 'newspaper' is a periodical containing, in addition to items of general news interest,

quantities of advertising, political comment, chess problems, crossword puzzles, comics and special features of unending variety." Friedman's Exp. v. Mirror Transport Company, D. C. N. J. 71 F. Supp. 991, 992. Advertising is in the nature of newspaper advertising regardless of whether it appears in newspapers, magazines, programs or some other publication. From this it would follow that an organization, club or association may sell advertising space in a bulletin, program, news sheet, magazine or pamphlet prepared by the organization, and that the candidate could legally expend funds to purchase such advertising space in the furtherance of his candidacy.

November 23, 1951—051-421.

ELECTION CAMPAIGN CARDS—CALENDARS—VIOLATIONS

QUESTION: Does the placing of a calendar, or similar items of convenience, on the back of a card of the type usually distributed by candidates during an election campaign constitute the giving of a thing of value within the prohibition of §99.172, F.S.?

To: Honorable A. W. Nichols, Jr., Clerk of the Circuit Court, Palatka, Florida:

Section 99.172, F.S., provides in part that "The expenditure of any money or giving, paying or promising to give or pay any money or anything of value directly or indirectly by any candidate in furtherance of his candidacy for nomination in a primary election, except for the purposes authorized by this section, is prohibited."

Among the purposes for which a candidate may expend money or give a thing of value, as provided by §99.172, are: "Clerks at his campaign headquarters to address, prepare and mail campaign literature," and "printing . . ." Although there is no law authorizing the handing out of campaign literature, it must be assumed, logically, that such was the intention of the legislature. So, clearly, a candidate may distribute campaign literature in the furtherance of his candidacy regardless of whether it may be considered of value or not.

Campaign literature in the accepted use of the term implies printed matter devoted to the furtherance of a persons' candidacy for office. Ordinarily, as would be expected, the printed matter is printed on paper and not on such things as pencils, blotters or balloons. Attorney General's Opinion 050-83 disallowed the use of paper match book covers as campaign cards. It was pointed out therein that in spite of the small monetary value of matches, they were objects which possessed sufficient value to come within the purview of the statute being considered.

Such statement could only be based upon the fact that matches are ordinarily acquired by purchase or as an incident of a purchase. By analogy the same reasoning may be applied to items of the sort enumerated above, whereas no similar statement can be made relative to items such as calendars, lists of fire alarm box numbers, lists of registered voters and county precincts, or list of the county designation numbers appearing on automobile license tags. These things are not ordinarily purchased, but are commonly available for the asking, free of charge. Such things as blotters,

pencils or matches, while often given without charge to promote sales of various items, are more frequently purchased by the individual who has need of them.

It is, therefore, my opinion that a card of the type questioned, since it is primarily campaign literature, may have printed on its back a calendar or any of the lists mentioned herein, such matter not being ordinarily purchased and not constituting a thing of value within the purview of §99.172, F.S.

The question submitted is answered in the negative.

November 29, 1951—051-432.

CANDIDATES—CAMPAIGN FUNDS—EXPENSES— “PRINTING”—BILLBOARD ADVERTISING

QUESTION: Is billboard advertising in the furtherance of one's candidacy for nomination for public office, a lawful expenditure of campaign funds within the meaning of §99.172, Election Code of 1951, (Ch. 26870, Laws of Florida, 1951)?

To: *Honorable James H. Sweeney, Jr., State Representative, Volusia County, Deland, Florida:*

Item (14) of the expenditures enumerated in and authorized by §99.172 includes “printing.” Although no specific type of printing is authorized, it is well to note that in the construction of legislation enacted under the police power of a state, an example of which is the Election Code of 1951, the intent of the legislature is to protect the public welfare from the infringement of the evil which the enactment is designed to control. In applying such construction, it is not at all obvious to me that the public welfare suffers any more from the use of billboard advertising in the furtherance of one's candidacy than it does from the use of other forms of campaign literature which are more definitely allowed.

It is therefore my opinion that the word “printing” as employed in item (14) of §99.172, Election Code of 1951, is sufficient authorization for the expenditure of campaign funds for the use of billboard advertising in the furtherance of one's candidacy.

The question set out above is answered in the affirmative.

December 19, 1951—051-471.

CANDIDATES—TAX COLLECTORS—COMPLIMENTARY BLOTTERS

QUESTION: Does the distribution of complimentary, pocket-size blotters bearing the name of a county tax collector who has announced his candidacy for renomination and an invitation to bring tax problems to him constitute the giving of a thing of value in the furtherance of such tax collector's candidacy for re-nomination within the prohibition of §99.172, Election Code of 1951, when such blotters are at all times available at the tax collector's office for the convenience of anyone who might enter such office?

To: *Honorable J. C. DeShong, Tax Collector, Highlands County, Sebring, Florida:*

Section 99.172, Election Code of 1951, provides in part that “. . . The expenditure of any money or giving, paying or promising

to give or pay any money or anything of value directly or indirectly by any candidate in furtherance of his candidacy for nomination in a primary election, except for the purposes authorized by this section, is prohibited."

In Attorney General's opinion, 051-421, November 23, 1951, it was stated that "... such things as blotters, pencils or matches, while often given without charge to promote sales of various items, are more frequently purchased by the individual who has need of them ..." The implication of that sentence is that since such things are ordinarily purchased, they constitute things of value within the meaning of §99.172, referred to above, and, hence, are prohibited when they are given in the furtherance of one's candidacy and do not come within the several enumerated things for which a candidate is allowed to expend money or give a thing of value. Thus, the complimentary blotters which you make available to visitors in your office are things of value and the statute prohibits a candidate from giving "anything of value".

It is therefore my opinion that if you should continue to make these blotters available after you become a candidate, they will constitute a furtherance of your candidacy in a manner which is not permitted by the law.

As the question is stated, I feel that it must be answered in the affirmative.

October 29, 1952—052-302.

U. S. PRESIDENTIAL CANDIDATES

QUESTION: Are candidates for election to the offices of president and vice-president of the United States required to comply with the provisions of §99.161, F. S.?

To: Mrs. Myrtice Brown, Democratic Committeewoman, Columbia County, Lake City, Florida:

The section referred to in the question is that part of the Election Code of 1951 which, among other things, requires that candidates for nomination for, or election to, political office in the State of Florida appoint a campaign treasurer, designate a campaign depository, file periodic reports of contributions and expenditures, and handle all campaign financial transactions in the manner prescribed by the law.

The applicability of the statute to candidates for political office is limited to those candidates who are seeking nomination or election to an office in the State of Florida. Since the offices of president and vice-president of the United States are not political offices in the State of Florida, candidates seeking those offices do not come within the contemplation of §99.161.

In consideration of the above conclusions it is my opinion that the question should be answered as follows:

Section 99.161, F. S., is not applicable to candidates for president and vice-president of the United States, and such candidates need not comply with the provisions of the act. This is not to say, however, that the persons in the prohibited classes described in

§99.161 (1) (a), (b), and (c), are in any way relieved from the express prohibition against making "any contribution of any nature to any political party."

November 17, 1952—052-314.

CANDIDATES—DISPOSITION OF CAMPAIGN FUNDS AFTER ELECTION

QUESTION: What disposition should be made of funds which remain in the campaign depository of a candidate after he has been finally elected or defeated?

To: Honorable Charles E. Fisher, Chairman, Pinellas County Republican Executive Committee, St. Petersburg, Florida:

Since the law is silent as to the proper disposition of funds which remain in a former candidate's depository, it was undoubtedly the intent of the Legislature that this matter be one within the discretion of each individual candidate. Provided a former candidate has been defeated or elected, there is no longer any reason for him to state the purpose for which he is withdrawing his campaign funds since they are no longer to be spent in furtherance of his candidacy. A candidate who has been elected or defeated need not make further reports of his contributions and expenditures, other than the post-election report required by §99.161 (8)(a) 3, F. S., to be made within fifteen days after the election.

It is, therefore, my opinion that a candidate who has been finally elected or defeated may dispose of the funds which remain in his campaign depository in any manner which he deems proper. With the exception of the post-election report referred to above, he need make no further reports of contributions or expenditure; and the bank which served as his depository, after performing the duties required of it by §99.161 (9), is under no further obligation as to the manner in which the candidate's account is finally closed. It should be understood that the final reports of the candidate and of his depository should indicate the amount which remains in the candidate's campaign fund, if any. Such amount as may remain can be withdrawn by the candidate and disposed of in whatever manner and for whatever purpose the candidate may specify.

GENERAL, PRIMARY, SPECIAL, BOND AND REFERENDUM ELECTIONS

August 7, 1952—052-243.

GENERAL ELECTION BALLOT—FAILURE TO PROVIDE NOMINEE—EFFECT

QUESTIONS: 1. May a board of county commissioners be required to print on the general election ballots the names of candidates for offices to be filled in such election when no candidates have been nominated for such offices in pursuance of law?

2. Must the title of an office to be filled in a particular general election be printed on the ballot even though no candidates have been lawfully nominated for the office?

To: Honorable D. S. Weeks, Clerk to Glades County Board of Commissioners, Moore Haven, Florida:

Your first question can be adequately answered by reference to Attorney General's Opinion 052-193, dated June 19, 1952, a copy of which is enclosed.

It should be noted in connection with the second question that the Supreme Court of Florida in *State v. Dillon*, (Fla.) 14 So. 383, has taken the position that "... the legislature cannot ... restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the constitution has guaranteed to him this right ...". The basis for the constitutional guaranty referred to is found in §6, Art. 6, Constitution of the State of Florida, wherein it is stated that "... in all elections by the people, the vote shall be by ballot." The use of the terms "ballot," "election by the people," and "vote" in the Constitution imply by their definitions that qualified electors are free to vote secretly for whomsoever they please and that no person or group of persons may lawfully restrict their choice when it is made evident in the manner prescribed by law.

In consideration of the statements made above it is my opinion that your question should be answered as follows:

1. As was stated in effect by my opinion 052-193, a board of County Commissioners may not properly have printed on a general election ballot the names of any persons who aspire for county, state, or national office unless such persons have been lawfully nominated by means of a regularly conducted primary election or unless such persons have by virtue of specific statutory exception been put in nomination by some other method.

2. In all instances, whether a candidate has been nominated or not, the title of an office which is required to be filled at a particular general election must appear in its usual position on the ballot with proper provision for the casting of a write-in vote.

October 24, 1952—052-296.

CANDIDATES—PRESIDENT & VICE-PRESIDENT— BALLOTS—SPLIT VOTE

QUESTION: In view of the provisions of §101.191, F.S., prescribing the form of the general election ballot, in order for a voter to vote for the presidential electors of a political party, must he cast a vote for each candidate for the respective offices of President and Vice-President of such political party?

To: Honorable Ellerbe W. Carter, Chairman, Republican Executive Committee, Brevard County, Titusville, Florida:

"The Election Code of 1951" is a codification and revision of all registration and election laws of this state and, subject to exceptions not relevant here, it is stated that such code was adopted by the legislature as Ch. 26870, Laws of 1951. Reference is made in the code to voting for presidential electors, directly or indirectly, in §§99.131, 101.151, 101.191, 103.011 and 103.021. Without laboring

the question, it is stated that the method for voting for presidential electors set forth in §99.131 has been superseded by the provisions of the other sections mentioned.

The effect of these laws is to provide that instead of voting directly for presidential electors, the vote is cast for the actual candidates for the political parties for the two offices involved; and such votes so cast for said candidates are counted as votes cast for the presidential electors of the party supporting such candidates.

In the prescribed form of ballot set forth in §101.191 in Ch. 26870, as said act is enrolled in the office of the Secretary of State, there is set forth the heading:

“ELECTORS
for President
and Vice-President”

and thereunder the instructions “vote for group”, followed by the names of the candidates for President and Vice-President under their respective party names, with further provision for “Write In” votes for such candidates. The form as prescribed has no division between the names of the candidates for President and Vice-President of a political party, and no separate squares or boxes for voting for each of such candidates.

Since it appears in the prescribed form of ballot in the enrolled act that it was contemplated that one vote should be cast for candidates for President and Vice-President of a political party, it follows that a vote cast for both or either of the candidates for the office of President or Vice-President of a political party will constitute a “Vote for group” within the meaning of such instruction on the ballot, and hence, will constitute a vote for the presidential electors of the political party.

It follows, further, that where a voter attempts to split his vote and casts votes for candidates for President or Vice-President in different party groups on the ballot, such votes are nullities with respect to the offices involved.

March 16, 1951—051-57.

WRITE-IN CANDIDATES—RIGHT TO VOTE FOR, NOT
PERMITTED

QUESTION: Is voting for a write-in candidate in primary elections permitted under our laws?

To: *Honorable Warren A. Wright, Supervisor of Registration, Pinellas County, Clearwater, Florida:*

Your request for opinion in effect states that you understand that properly there may not be a vote cast for a write-in candidate in primary elections; that you have been questioned concerning the matter and have been unable to find law to “back us up”; that you desire an official opinion of this office upon the subject.

The right of an elector to vote for a write-in candidate in the general election is not only permitted, but facilities to permit the exercise of that right mandatorily must be afforded, whether paper

ballots are used (§99.18) or voting machines are used (§100.18). The reason for this provision is obvious. Only the names of political party candidates, duly nominated, may be printed on our general election ballot. (§99.10). The qualifications for electors in the general election are those prescribed in our constitution (Art. VI, §§1 to 5 inclusive; also see §98.01). It is instantly apparent that political party affiliation is not a qualification to vote in the general election. Further, unless there were provisions in our law for voting for write-in candidates then only political party nominees could hold office, which would offend constitutional provisions.

On the other hand primary elections are fundamentally different from general elections. They are political party elections for the nomination of party candidates for public office. Florida controls primary elections (Ch. 102). It has been noted that the form of ballot prescribed for the general election requires that there be left a blank line for the purpose of voting for a write-in candidate. It is to be observed also that in our primary election laws the form of the primary election ballot is set forth in considerable detail and that there is nothing in the law which provides that such ballot shall be so prepared as to permit voting for a write-in candidate. In connection with specifications for the ballot as set forth in §102.38, there is the provision that should the directions for preparation of the ballot set forth in such section be insufficient, the Secretary of State shall determine and prescribe with respect to any required additional matter or form. For the reasons hereinafter set forth it does not reasonably appear that the Secretary of State would be authorized under subsection 102.38 (6) to provide a form of ballot permitting voting for write-in candidates in primary elections.

Laws controlling primary elections are valid and in the interest of public welfare, subject to the exceptions hereinafter noted (State v. Carson, 114 Fla. 451, 154 So. 150; State v. Tyler, 112 Fla. 1112, 130 So. 721; 29 C.J.S. 146-149, §111). Various aspects of Florida's primary election law (Ch. 102) have been before our court and have been sustained (State v. Carson, *supra*; State v. Tyler, *supra*; State v. Gray, 107 Fla. 73, 144 So. 349; State v. Gerow, 79 Fla. 804, 85 So. 144). If a primary election act might tend to destroy the inherent character of the political party (Britton v. Election Commissioners (Cal.) 61 P. 115), or by its provisions deny equal protection (Nixon v. Herndon, 71 L. Ed. 759), or (in those states like Florida where the primary election is considered a part of the general election processes) interfere with the right to vote for certain national officers or rights under the XV Amendment, Federal Constitution (U. S. vs. Classic, 313 U. S. 299, 85 L. Ed. 1368; Smith vs. Allwright, 321 U. S. 349, 88 L. Ed. 987), or otherwise contravene constitutional rights, the act would be invalid to such extent. Otherwise, such an act is supreme to the extent of its provisions and is controlling on all political parties and candidates.

Chapter 102 is a comprehensive primary election law. As indicated above, its validity derives from the state's police power. As comprehensive legislation, among other things, it defines political parties; the character of, and election of members to, party executive committees; authorizes imposition of party assessments; requires payment by candidates of filing fees; fixes the deadline for candidates to qualify; in the candidate's oath fixed by §102.29, pre-

scribes the qualifications and party fealty requirements of candidates; specifies the times within which candidates must file expense statements; and explicitly or implicitly limits the names of party candidates which may be printed on the primary election ballot to those who have complied with the provisions of the act applicable to them. To permit the voting for a write-in candidate in the primary election would be to nullify some or all of the police regulations of the act with respect to candidates, and might permit the nominating of a party candidate who could not meet the party fealty tests required of party candidates. Our courts have long held that party fealty tests required of voters and candidates are valid and that such are necessary to preserve party organization (*Lett. vs. Dennis* (Ala.) 129 So. 33; *Ladd vs. Holmes* (Oregon) 66 P. 714; *State vs. Drexel* (Md.) 105 N. W. 174; *Kelso vs. Cook* (Ind.) 110 N. E. 987; *State vs. Michel* (La.) 46 So. 434; *State vs. Felton* (O.) 84 N. E. 85).

On the basis of the foregoing, the question is answered in the negative; that is to say, that the right to vote for write-in candidates in our primary elections is not permitted under our laws.

August 22, 1952—052-258.

SPECIAL PRIMARY ELECTIONS—OFFICE OF STATE SENATOR—CANDIDATES—QUALIFICATION TIME

QUESTION: The Governor has called a special first primary to be held on October 14, 1952, and, if necessary, a special second primary to be held October 21, 1952 "to provide a Democratic Nominee for the office of State Senator for the Seventeenth Senatorial District composed of the counties of Hamilton, Lafayette and Suwanee", the vacancy in nomination being occasioned by the death on August 3, 1952, of the late Dr. C. Leroy Adams, Democratic Nominee for such office selected in the regular 1952 primaries. What time is permitted candidates to qualify for nomination for such office in said special primaries?

To: Honorable R. A. Gray, Secretary of State:

In relation to the above question the request for opinion states, "some have suggested that §100.121 should be followed." To settle that suggestion, it will be helpful briefly to recite certain events prior to issuance of such call of the Governor for the holding of said special primaries.

On August 12, 1952, the Governor requested the Supreme Court to advise him if he had the authority to call a special primary election "to fill the vacancy in nomination of the late Roy H. Chapman for Justice of the Supreme Court of the state of Florida, for the full term of six years, beginning the first Tuesday after the first Monday in January, 1953." Under date of August 12, 1952, the Supreme Court advised the Governor in effect that under §100.111 (2) (c) it was his duty to call a special first primary and, if necessary, seven days later a special second primary for the purpose of filling such vacancy in nomination.

On August 15, 1952, the Governor issued a Proclamation calling for the holding of a special first primary on October 14, 1952, and, if necessary, a special second primary on October 21, 1952, for

the purpose of providing Democratic nominees for the following offices: Justice of the Supreme Court "to succeed the Honorable Roy H. Chapman"; State Senator for the Seventeenth Senatorial District; and for all other state or county offices in which a vacancy has occurred later than thirty days before the regular first primary and before forty days prior to the general election. It is to be noted that the questions propounded by the Governor to the Supreme Court related only to the vacancy in nomination occasioned by the death of the late Justice Chapman. His death created not only a "vacancy in nomination", but also a "vacancy in office".

It is assumed that the Proclamation of the Governor of August 15, 1952, derived from his construction and application of the aforesaid Advisory Opinion in relation to all vacancies in nomination mentioned in said Proclamation. The purpose of this opinion is to assist the Secretary of State in carrying out the apparent intent of the Governor's Proclamation. In this connection it is well to note that only §§100.111 and 100.121, F.S., provide for the holding of special primaries in the event of vacancies.

Such power as the Governor may possess to call for the holding of special primaries to fill the vacancy in nomination for the office of State Senator for the Seventeenth District would seem to derive from §100.111 (6). However, whether that power has been asserted under the provisions of §100.111 (2) (c) or §100.111 (6) would seem immaterial since under both these provisions it is stated that, "Ten days shall be allowed from the time the vacancy occurs in which to specially qualify . . ." in the special primaries provided. This statutory requirement as here applied appears harsh; however, the quoted words are clear and unambiguous in meaning. (See *Fine vs. Moran*, 74 Fla. 417, 77 So. 533; *State vs. Beardsley*, 81 Fla. 109, 94 So. 660; *Smith vs. Ryan* (Fla.) 39 So. 2d. 281.)

Section 100.121, F.S., sets up the procedure to be followed when there is a vacancy in an elective office which may not be filled by appointment "and a special election is called by the Governor to fill the vacancy", and is to be read in *pari materia* with paragraphs (b), (c) and (e) of §100.111 (6). Section 100.121 (1) provides in effect that the Secretary of State shall fix the last day for candidates to qualify when the procedure contemplated by the section is invoked. It appears that the provisions of §100.121 are not here applicable.

Adopting the apparent construction and application by the Governor of the aforesaid Advisory Opinion in relation to the office described in this question, candidates for nomination in the special primaries must have qualified by the tenth day after the vacancy in nomination occurred; that is to say, that such time for qualifying existed only during the period from August 3 to and including August 13, 1952. Hence, the provisions of §100.121 (1) are not here applicable.

February 28, 1951—051-42.

SCHOOL BOND ELECTION—PURGE OF REGISTRATION RECORDS

QUESTION: In a Florida county a bond election for school construction was apparently defeated because a majority of voters

listed as qualified freeholders did not participate in the election. Would it be legal for the county commissioners to purge the list of voters at this time of deceased voters, voters no longer qualified, and those who have permanently removed residence with the possibility that there would then be a sufficient number of votes cast to constitute a majority of qualified freeholders?

To: Honorable Thomas D. Bailey, Superintendent Public Instruction:

There is lack of detail in the above statement and question, which is taken from the request for opinion. The information therein set forth is supplemented orally by the office of the State Superintendent of Public Instruction to the effect that the said election has been duly canvassed.

Elections of the nature here dealt with are controlled by §§236.36-236.42, F.S., Art. IX, §6, and Art. XII, §17, Florida Constitution; and, at the option of school boards, such provisions of Ch. 103, F. S., not in conflict with the provisions of such sections.

Prior to adoption of the present school code, issuance of school bonds depended upon compliance with §§720-726, C. G. L. In *State vs. Barker* (Fla.) 168 So. 534, it was declared that a special tax school district bond election conducted in pursuance of said sections, with due regard for constitutional provisions, was valid; that nevertheless, Ch. 14175 (now Ch. 103, F.S.) furnished an alternative method for holding such an election, at the option of the school board. In view of the general purposes and similarities between §§720-726, C. G. L. and §§236.36-236.42, F.S., this holding of the court in *State vs. Barker* would seem now applicable in relation to these last-named statutes and Ch. 103. Whether or not this election was held in pursuance of the provisions of Ch. 103, modified to the extent required by §§236.36-236.42, is not apparent from the request for opinion. In any event, the canvassing board (county school board) in canvassing this election was required to ascertain if "a majority of the freeholders who are qualified electors" in the area involved participated in the election (see Art. IX, §6, and Art. XII, §17, Florida Constitution).

It is to be observed from the oral information furnished by the State Superintendent's office that the canvassing board heretofore has completed its canvass of this election. The better rule seems to be that when the canvass has been completed and the canvassing board has adjourned sine die, properly it may not reconvene to correct or reconsider the matter (18 Am. Jur. 348, §256). Had not the canvassing board heretofore completed its canvass of said election, it is quite likely that on the authority of *Bowers v. Alachua County*, (Fla.) 8 So. 2d. 395, that board, subsequent to the holding of this election could have determined to its satisfaction and best judgment from the registration records the registered electors who were freeholders on election day and as such qualified to participate in such election.

If it has been determined that less than a majority of freeholder electors who were qualified to participate in this bond election participated therein and, hence, for that reason the election failed, a second election may be held at any time despite provisions of §236.42, F.S. (*State v. Barker*, supra).

From the facts supplied this office both orally and in the request for opinion it does not appear that the board of county commissioners properly may purge the list of voters in the county involved for the purposes of this election. For the reasons appearing above, it does not seem that the county school board, as the canvassing board of such election, may now reconsider the matter of the number of freeholder electors in the county on election day qualified to participate in such election. It would appear that on the authority of *State v. Barker*, supra, the procedure for the calling and holding of another election may be commenced at any time.

September 24, 1951—051-331.

COUNTY COMMISSIONERS—ELECTION BOARD— REFERENDUM ELECTION

STATEMENT AND QUESTIONS: In view of the provisions of Ch. 22195, Laws of 1943, as amended, and Ch. 27933, Laws of 1951:

(1) Should the referendum election provided in §18 of Ch. 27933 be *called* and *held* by the Board of County Commissioners of Hillsborough County?

(2) Should such election be *called* by the Board of County Commissioners of said county and *held* under the auspices of the County Election Board of such county?

(3) Should said election be *called* and *held* by such County Election Board?

To: *Honorable William C. McLean, County Attorney, Tampa, Florida.*

The County Election Board was created and functions in Hillsborough County by virtue of the provisions of Ch. 22195, Laws of 1943, as amended by Ch. 22723, Laws of 1945, Ch. 25522, Laws of 1949, and Ch. 27134, Laws of 1951. The only change in substance of the original act here necessary to be mentioned consists of the amendment of §8 thereof by Ch. 22723. The amended section provides: "All administrative acts, relating to elections, including those provided by this law, which are by general law vested in the Board of County Commissioners and required to be done and performed by it under such law, shall be transferred to and vested in the County Election Board which shall do and perform all such administrative acts relating to elections."

The County Election Board in Hillsborough County is vested, by virtue of such legislation, with extensive powers in relation to holding primary, general, special, special tax school district and bond elections and all other elections of any kind or nature held in the county except municipal primaries and elections. Certain of the powers of said board are mentioned briefly: examination and revision of registration records prior to an election; the appointment of inspectors and clerks of election boards to conduct an election, with power to remove unfit election officials so appointed even during progress of an election; control of voting machines owned by or in control of the county; recommendation of special deputy sheriffs to be appointed by the sheriff to serve

at the polls on election day; and, with the supervisor of registration, the canvass of election returns.

Chapter 27933, Laws of 1951, authorizes extension of the corporate limits of the City of Tampa, subject to provisions of §18 thereof, as follows: "This act shall become effective upon being ratified and approved by a majority of the registered freeholders of the area described in Section 1 of this act, voting at an election to be called and held in said area by the county commissioners, after the first Monday in November, 1951, and not later than December 31, 1951, providing that this act may be submitted to the voters of said territory at any other election therein during that time."

Section 19 of Ch. 27933 provides: "All laws and parts of laws conflicting with the provisions hereof are hereby repealed in so far as they conflict with the provisions of this act except as hereinbefore provided."

Specifically, the County Election Board is not vested, in any of said mentioned acts pertaining to it, with power to "Call" an election. If such power exists under any circumstances, which is not here conceded, it derives from the general provisions of amended §8 of Ch. 22195, above quoted. However, it is not necessary here to determine such question. The "administrative acts" relating to elections, mentioned in said amended §8, to be performed by the County Election Board, are those acts which are "by general law vested in the Board of County Commissioners." The duty cast upon this latter board to call this referendum election derives from the provisions of Ch. 27933, a *special* act; and it would reasonably appear that said board should "call" such election. This leaves the question of whether §18 of Ch. 27933, providing that said election shall be "held" by the Board of County Commissioners, repeals Ch. 22195, as amended, in so far as this election is concerned. In view of the general repeal set forth in §19 of Ch. 27933, we are concerned with the question of repeal by implication as distinguished from express repeal (50 Am. Jur. §520, page 528, and citations in footnote 12; see repeal clauses of acts dealt with in *Tamiami Trails Tours vs. City of Tampa*, 31 So. 2d 468).

Implied repeals are not favored; and such repeals will not be deemed to have been intended unless that intention is clearly manifest. Thus, a statute will not be held to repeal a former one unless positively repugnant thereto or unless the statute last enacted was clearly intended to prescribe the only rule which would govern the case provided for or revises the matter of the earlier statute or expressly repeals it (*State vs. Gadsden County*, 63 Fla. 620, 58 So. 232; *Middleton vs. State*, 74 Fla. 234, 76 So. 785; *Scott vs. Stone*, 129 Fla. 784, 176 So. 852; *American Bakeries Co. vs. Haines City*, 131 Fla. 790, 180 So. 524; *Beasley vs. Coleman*, 136 Fla. 393, 180 So. 625; *Miami Water Works Local No. 654 vs. City of Miami*, 157 Fla. 445, 26 So. 2d 194). Further, the fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute (*Burr vs. F. E. C. Ry. Co.*, 77 Fla. 259, 81 So. 464; *State vs. Rose*, 97 Fla. 710, 122 So. 225); and such intent is the essence of the law and may be shown

by implications and intendments as well as by words of express provisions (*Getzen vs. Sumter County*, 89 Fla. 45, 103 So. 104).

Chapter 22195, while a population act with a spread of 100,000 at the time of its enactment applied only to Hillsborough County. By successive amendments, the population brackets have been changed so that still it applies only to such county (Ch. 25522, Laws of 1949, a bracket of 135,000-270,000; Ch. 27134, Laws of 1951, a bracket of 200,000 to 300,000). Since enactment of the 1943 law, said County Election Board has exercised its powers under the described legislation in connection with all elections held in the county, except municipal primaries and elections. Further, legislative recognition with respect to Ch. 22195 creating such election board is found in revised and amended §98.381, F. S., in "The Election Code of 1951" (Ch. 26870), which provides that all registration laws after January 1, 1960, in conflict with "The Election Code of 1951" are repealed, except "Ch. 22195, Laws of 1943, creating the Hillsborough County Election Board."

Reasonably it appears that since the adoption of Ch. 22195, the Legislature by enactment of the mentioned statutes relating to said election board has from time to time, including the 1951 session, evidenced its intent that all elections, other than municipal ones, in said county shall be conducted by the County Election Board; that on the basis of the mentioned legislation involved and the rules of statutory construction recited, it was not the legislative intent that this referendum was so peculiar or unique that the holding of it should be removed from control of the County Election Board; that said election board is the medium through which said election shall be "held" by the Board of County Commissioners, as such quoted word is used in §18 of Ch. 27933. In support of this position, reference is made to the proviso concluding said §18;—it is assumed that were this referendum question submitted to the voters of the described area "at any other election therein during that time," such "other election" would be held under the supervision and control of the County Election Board. Thus, reasonably it appears that when all involved statutes are construed in *pari materia*, no irreconcilable conflict results in relation to holding this election.

Hence, the three questions above are disposed of by the following answer:

The referendum election provided in §18 of Ch. 27933, Laws of 1951, shall be called by the Board of County Commissioners of Hillsborough County. Such referendum election shall be held and conducted by the County Election Board of that county under and within its powers as set forth in Ch. 22195, Laws of 1943, as amended.

Chapter 22195, as amended, is a population act which apparently has never been tested in our Supreme Court. It is here assumed that such legislation is valid; and this opinion is conditioned upon such assumption.

It is recognized that the question here presented is controversial, and that this opinion may not settle the question with finality. It is remarked that there appears to be sufficient time

to have these statutes construed in a declaratory decree proceedings, if interested parties so desire.

VOTING; BALLOTS, VOTING MACHINES, ABSENTEE; PROCEDURE FOR REPORT

October 2, 1952—052-284.

GENERAL ELECTION BALLOT—COUNTY OFFICE— INDEPENDENT CANDIDATE'S NAME

QUESTION: May the Board of County Commissioners print the name of an independent candidate for a county office on the general election ballot when so requested to do by a petition signed by a number of qualified electors?

To: *Honorable Harry A. Johnson, County Attorney, Palm Beach County, West Palm Beach, Florida:*

It is here assumed that the words "county office," as used in the above question, refer to those regular county offices provided by the Constitution and general laws of this state to be filled at the general election.

As above conditioned, the question is answered as follows: There is no provision in our election laws for the name of an independent candidate to be printed on the general election ballot in pursuance of petition of electors of the county. It is, of course, recognized that at the general election a voter is permitted to cast his vote for a "write-in" candidate.

September 4, 1951—051-302.

ELECTION CODE 1951—VOTING MACHINES—CUSTODIAN

QUESTION: On and after the effective date of Ch. 26870, Laws of 1951 (Sept. 1, 1951), will amended Section 101.34 therein, providing that the supervisor of registration shall be custodian of voting machines, repeal Ch. 21907, Laws of 1943, which provides that in counties having a population of more than 250,000 "according to the last preceding State or Federal Census" the custody and control of voting machines shall be in the Board of County Commissioners?

To: *Honorable Carl Holmer, Jr., Supervisor of Registration, Miami, Dade County, Florida:*

Chapter 26870 is referred to in the title and body of the act as "The Election Code of 1951," and is referred to in this opinion as the "Code". Amended and revised sections of the Code are referred to herein as amended sections.

The request for opinion refers to the "Special Population Act affecting Dade County which provides that voting machines shall be in the custody of the County Commissioners." It is here assumed that this refers to above-mentioned Ch. 21907.

Amended §101.34 of the Code is the same in substance as present Section 100.42, F.S., which originally was §3-A, Ch. 22018,

Laws of 1943, as amended by §4, Ch. 24089, Laws of 1947. Section 5 of this last-named chapter sets forth a general repealing clause, with the proviso to the effect that "local, special or population acts" applicable in one or a limited group of counties were not affected by any provision of Ch. 24089. Above-mentioned Ch. 22018, by §11 thereof, repealed "Ch. 18407, Laws of Florida 1937, and all other laws and parts of laws in conflict herewith;" and had no proviso with respect to such "local, special or population acts" as set forth in the 1947 act. Chapter 21907 became effective May 31, 1943. Chapter 22018 became effective June 11, 1943. It is readily apparent that there exists here a serious question as to whether Ch. 21907 was repealed by Ch. 22018. However, this opinion does not deal with that question.

Thus, these matters are assumed: that Ch. 21907 is the "Special Population Act" referred to in the request for opinion; and that such chapter now and hitherto since its adoption in 1943 is and has been valid law controlling in Dade County. Let it be distinctly understood that this opinion is conditioned upon such assumptions.

The title of the Code recites, in effect, that it amends and revises Chs. 97, 98, 99, 100, 101, 102, 103 and 104, relating to the qualification and registration of electors; registration officers and procedures; candidates, campaign expenses and contesting elections; general, primary, special, bond and referendum elections; voting; conducting and canvassing results of elections; presidential electors, political parties, executive committees and members; and repealing Chs. 105, 106 and 875. With this statement concerning the nature of the act as set forth in the title, it is relevant to direct attention to specific mentions of repeal in the Code.

The Code includes (with certain changes) the permanent single registration system which now and since shortly after its passage in 1949 has been carried as Ch. 97, F. S. (amended §§98.041 to 98.151, inclusive), and specifically recognizes and preserves until January 1, 1960 (unless at an earlier date the permanent system in the Code is adopted by a county) permanent registration systems in certain of the counties established by special or population acts (amended §98.141). It is further provided that existing laws relating to registration of electors shall remain in full force and effect until the system is adopted in a county (amended §98.151), which must be done by January 1, 1960 (amended §98.041), and that upon "adoption of this permanent registration system, all state laws in conflict or inconsistent with the provisions of this Code shall cease to remain in full force and effect" (amended §98.151—and this quoted provision is to be construed in relation to registration provisions of the Code only). All "local laws" that conflict with the Code shall stand repealed after January 1, 1954 (amended §104.44). Chapters 105, 106 and 875, F. S., together with sections or parts of sections of Chs. 97, 98, 99, 100, 101, 102, 103 and 104 not revised or brought forward in the Code are repealed (§9, Ch. 26870).

The matters set forth in the preceding paragraph constitute all provisions of the Code mentioning present or future repeal of any laws. For the reasons set forth below, the position is here assumed that Ch. 21907 is a general and not a local or special law.

Hence, the answer to the question stated at the outset must depend upon the determination of whether Ch. 21907 at the effective date of the Code will be repealed by implication by the provisions of the Code, particularly amended §101.34.

It is sufficient here to state that Ch. 21907 provides that in each county in Florida "having a population of more than 250,000 according to the last preceding State or Federal census, wherein voting machines now or hereafter may be used, the custody and control of said voting machines at all times, except when the same are in use at any election, shall be in such Board of County Commissioners." In 1943 only Dade County had more than 250,000 population. The state census of 1945 and the federal census of 1950 place both Dade and Duval counties in that population bracket. (This opinion does not deal with the question of the applicability of Ch. 21907, to Duval County). That chapter is in form a general law; and it is not the province of this office to attempt to determine whether as a technical matter of law it is a general or "local" or special law. We accept it as a general law and will continue to do so unless and until some court in a proper proceedings shall hold otherwise. Furthermore, persuasive argument can be urged that it is a general law and that the classification therein found is reasonable (*State ex rel Baker vs. Gray*, 133 Fla. 23, 182 So. 620; *Waybright vs. Duval County*, 142 Fla. 875, 196 So. 430; *State ex rel Baldwin vs. Coleman*, 148 Fla. 155, 3 So. 2d. 802; *State vs. Dade County*, 157 Fla. 859, 27 So. 2d. 283).

As indicated above, amended §101.34 is in substance present §100.42, F. S., and the effect thereof is to designate the supervisor of registration as custodian of voting machines.

These appear to be proper rules to apply when the question of the implied repeal of one statute by a later one arises: (1) Implied repeals are not favored. (2) Repeals by implication will not be deemed to have been intended unless that intention is clearly manifest. (3) A statute will not be held to repeal a former one unless positively repugnant thereto or unless the latter was clearly intended to prescribe the only rule which would govern the case provided for, or revises the subject matter of the former or expressly repeals it. (4) The doctrine that a statute is impliedly repealed by a subsequent statute, revising the whole subject matter of the first, is restricted and does not apply to its full extent where the revisory statute declares what effect it is intended to have upon the former, as where it provides that it shall operate to repeal all inconsistent and repugnant acts, or all acts whose subjects are revised, consolidated or reenacted in the revision or code; and in such cases only such effect can be given to the revisory act as it directs—the enumerated acts are repealed; all others remain in force. The following authorities are cited in support of one or more of these principles: *State v. Gadsden County*, 63 Fla. 620, 58 So. 232; *Middleton vs. State*, 74 Fla. 234, 76 So. 785; *Scott vs. Stone*, 129 Fla. 784, 176 So. 852; *American Bakeries Co. vs. Haines City*, 131 Fla. 790, 180 So. 524; *Beasley vs. Coleman*, 136 Fla. 393, 180 So. 625; *Miami Water Works Local No. 654 vs. City of Miami*, 157 Fla. 445, 26 So. 2d. 194; *Crawford, Statutory Construction*, Section 326, page 675; 59 C. J. §524, pages 923 and 924.

There is another principle of statutory construction relevant here. Generally, a revision is a restatement of existing statute law, either in the same or substantially the same language; and where this is true, the old statutes incorporated in the revision are continued without change in their meaning. We have heretofore stated that amended §101.34 of the Code is the same in substance as §100.42, F. S. Crawford, Statutory Construction, page 190, §132. Following such principle, amended §101.34 bears the same relationship to Ch. 21907 as did former §100.42.

Granting that Ch. 21907, Laws of 1943, is a general law, as we have here assumed, at the time of the enactment of the Code it formed a part of the general election laws of this state. It is not mentioned in the title or body of the Code as amended or revised. It is not specifically repealed by any provision of the Code, whereas, other laws particularly described in the Code are therein repealed or will stand repealed at designated future dates. Applying the above rules and authorities, the better position would seem to be that Ch. 21907, Laws of 1943, on and after the effective date of the Code, will *not* be repealed by the Code, particularly by amended §101.34.

Hence, for the reasons and conditioned as set forth above, the question is answered in the negative.

April 22, 1952—052-129.

ABSENTEE BALLOTS—APPLICATION—SIGNATURE UNDER OATH—WITNESSES

QUESTION: In making a written request for an absent voter's ballot (as distinguished from a request made on the blank form supplied by a supervisor of registration) is it necessary that the applicant sign the request under oath and have it signed also by two witnesses?

To: Honorable Lorne Yetter, Supervisor of Registration, Hardee County, Wauchula, Florida:

In my opinion of April 19, 1950, 1949-50 Biennial Report, p. 115, a copy of which is enclosed, it was stated that "... any application which is not so witnessed and sworn to does not meet the requirement of the law and is insufficient as the basis for the issuance to the applicant of an absent voter's ballot ..." Although the question which prompted the above quoted statement was concerned with the validity of an application form which had been filled out, signed and witnessed but not sworn under oath, it would appear that the requirement of oath and witnesses should be equally applicable where an applicant makes a written request and does not use the application form supplied by the supervisor.

Section 101.62, F. S., states that an application may be made on a blank prepared by the applicant if the application is substantially in the form required and set out in the said act. A substantial compliance with that form would require that the application contain all the essential elements of the form and, therefore, that it be sworn to and witnessed. This is true in spite of the implication which may be read into one sentence of §101.62 that a written request or application will be sufficient if it merely

states statutory grounds for making an application and if the signature agrees with the applicant's signature on the registration books. To allow such a meager application to suffice in itself would be to destroy the efficacy of the remaining portions of the law and to render ineffectual the obvious intent of the several sections of the code devoted to absentee voting procedures.

It is, therefore, my opinion that any application for an absent elector's ballot must be signed under oath by the applicant and signed and sealed by two witnesses. The question as phrased herein is answered in the affirmative.

April 29, 1952—052-138.

ELECTIONS—CANVASSING ABSENTEE BALLOTS— EARLIEST LEGAL DATE

QUESTION: What is the earliest legal time following an election (primary or otherwise) that the county canvassing board may convene and canvass the absentee ballots voted at such election?

To: Honorable Harvey E. Page, County Judge, Escambia County, Pensacola, Florida:

The request for opinion mentions that in close political races the outcome may depend upon absentee votes. The specific question presented is set forth in the following quoted part of the letter from this public officer: "I wish to request an opinion as to the earliest legal time the Canvassing Board may convene for the canvassing alone of the absentee ballots."

A part of §101.68, F. S., provides that, "The supervisor of the county where the absent elector resides shall receive the voted ballot and shall safely keep the ballot unopened in his office until the board of county canvassers *canvasses the vote according to law.*" (Emphasis supplied). Thus it is to be noted that this quoted wording, particularly the underscored part thereof, reasonably indicates that absent electors' ballots are not to be canvassed by the county canvassing board separately from that board's canvass of the entire vote cast at the election.

A part of §102.141 provides that, "On the third day after any election, or sooner if the returns are received, the county judge and supervisor with the assistance of the chairman or other members of the board of county commissioners shall meet in the supervisor's office." Mention is also made of another part of this section: "The canvass, except absent electors' returns, shall be made entirely from the returns and certificates of the inspectors, as signed and filed by them with the county judge and supervisor, respectively . . ." Thus again it is apparent from this section that absent electors' ballots are to be canvassed at the same time as the other votes cast at such an election.

There is no provision in our laws for the county canvassing board to meet and canvass only absent electors' ballots. They are to be canvassed at the time the county canvassing board meets, according to law, to canvass all votes cast at any such election, including absent electors' ballots. As above noted, the county

canvassing board shall, on the third day after any election or sooner, if returns are received, convene and canvass all the votes cast at such election.

June 30, 1952—052-204.

SUPERVISORS OF REGISTRATION—ABSENTEE BALLOTS—APPLICATION

QUESTION: May a Supervisor of Registration send absentee ballots to qualified electors who made application therefor more than forty-five days prior to an election?

To: Honorable John C. Dekle, Supervisor of Registration, Hillsborough County, Tampa, Florida:

The statement in §101.62, that an absent elector may make application for an absentee ballot at any time within forty-five days preceding an election, is not mandatory with respect to the time prior to the election during which such application may be made. Hence, it does not necessarily mean that an application will be denied if it is received forty-six or more days before an election. The fact that a time limitation is mentioned in the statute only serves as a directive that electors should not apply for an absentee ballot so far in advance of an election as to cause unnecessary work for a supervisor in keeping the applications on file or in processing them in the event that the applicant is not required to be absent and requests that his application be ignored.

Since, in §§101.63 and 101.64, provision is made for keeping the applications on file until the absentee ballots are ready to be mailed, there is no plausible reason why a supervisor might not properly place an application in such file and grant the elector's request that he be sent the ballot which he indicated in his application when such ballot becomes available. Although a supervisor is under no obligation to accept applications received more than forty-five days prior to an election, neither is he required to deny such applications. An absent elector who makes application for a ballot prior to the forty-fifth day preceding an election in which he desires to vote assumes the risk that his ballot may be mislaid or that it may not be properly filed. A supervisor could with equal propriety return or accept an application filed more than forty-five days prior to an election. His official duty in regard to such applications appears to commence on the forty-fifth day preceding an election.

Therefore, it is my opinion that a supervisor, upon receiving an application for an absentee ballot more than forty-five days before an election, may accept the application, file it, and comply in due time with its request for the ballot desired by the elector, provided that the application is made in compliance with all other provisions of the law and provided the elector is properly qualified to vote by absentee ballot.

July 14, 1952—052-214.

SUPERVISORS OF REGISTRATION—UNCOUNTED ABSENTEE BALLOTS—PRESERVATION

QUESTION: How long should a supervisor of registration

keep on file in his office those unopened absentee ballots which were received after five o'clock P. M. on the day before the election and which were, therefore, too late to be counted?

To: Mrs. L. V. King, Supervisor of Registration, Punta Gorda, Florida:

Section 101.67, F.S., provides in part that "... All marked absent elector's ballots to be counted must be received by the supervisor by 5 o'clock in the afternoon of the day preceding any election, all ballots received thereafter shall be marked with the time and date of receipt, and filed to his office . . ."

There being no indication in the Election Code as to how long such late absentee ballots should be kept on file, it would seem that their safe keeping should not be for a period different than that indicated for the keeping of all ballots which were properly voted, whether absentee ballots or not. Although there is not a specific provision in our present Election Code which designates the period during which voted ballots must be preserved, it is clear that the primary reason for their preservation is that they may be available for a recount when such is required by the proper courts.

In opinion 052-69, dated May 30, 1952, the following statements were made: "It may be that . . . a contest of the regularity of a primary nomination is confined to the procedures specifically described in §§99.192-99.231, both inclusive (Florida Statutes, 1951). However, until a court shall hold otherwise, we are not inclined to assume that other remedies are excluded. If other remedies are not excluded (e.g., judicially required recount by mandamus), they would not be subject to the ten-day limit set forth in §99.192. A contest involving a recount may be had only if the boxes and contents involved are so held that the integrity of the ballots is preserved (see *State vs. Haskell*, (Fla.) 72 So. 651; *Farmer vs. Carson*, (Fla.) 148 So. 557; *State vs. Latham*, (Fla.) 170 So. 469). Nevertheless, in the absence of a suit or action involving a box and its ballots, the box may be opened at any time after ten days from the canvass of the election in which the ballots were voted."

Since the opening of a sealed ballot box, after the lapse of ten days following an election would virtually destroy the effectiveness of the ballots contained therein as evidence in a court proceeding, and since an uncounted absentee ballot is not entitled to any more protection than counted ballots, it is my opinion that the question should be answered as follows:

Absentee ballots which were not counted by a canvassing board because of their late arrival in the office of the supervisor should be kept on file by the supervisor, unopened, for at least ten days following the canvass of the votes cast in the election in which the absentee ballots were intended to have been counted. If when it is proposed by the supervisor that such absent ballots should be disposed of, the ten-day period having elapsed, a suit or action of any nature is pending and the preservation of the ballots is essential to that proceeding, then under no circumstances should the ballots be opened or removed from the supervisor's files except

in pursuance of an appropriate court order. If there is no court action pending, and if the ten-day period has elapsed, then the supervisor may destroy the ballots without opening them or in any way revealing their contents.

October 24, 1951—051-378.

ELECTION PRECINCTS—NUMBER OF POLLING PLACES— RACE SEGREGATION

QUESTION: In view of the provisions of §§101.24 and 101.71, F.S., as revised and amended in Ch. 26870, Laws of 1951, may there be provided more than one polling place in an election precinct, so that in such precinct there shall be a polling place for voting by members of the colored race and a polling place for voting by members of all other races?

To: Honorable Roland X. Droit, Supervisor of Registration, Highlands County, Sebring, Florida:

It is here assumed that the general laws relating to elections, as set forth in Ch. 26870, Laws of 1951, ("The Election Code of 1951"), control with respect to elections in Highlands County. This opinion is conditioned upon such assumption.

My immediate predecessor in office dealt with this question in opinion 047-386 (Biennial Report of Attorney General, 1947-1948, page 72), copy of which is attached. It is to be noted that such opinion turned on the application and construction of former §§99.01, 99.02, 99.04 and 99.06, F.S. Chapter 26870, above mentioned, is a comprehensive amendment and revision of the registration and election laws of Florida. In substance, subject to certain changes not of moment here, the above-named sections appear in said revision as §§98.241, 101.24, 102.021 and 101.71, respectively. On the basis of the law set forth in these revised sections, the conclusions reached in said former opinion are adopted, subject to the exception noted below with respect to the following paragraph thereof:

"It is also my opinion that the one polling place in the said precinct could, without doing violence to the intention of the legislature, be so arranged that there could be two entrances to the polling place, one for negro electors and one for other electors, so that there would be no intermingling of the races."

The following excerpt from present §101.71 reasonably leads to the conclusion that there may be but *one* place of entrance to the polls and *one* place of exit from the polls:

"The inspectors of election shall rail off and construct a space, in which to hold an election, with an opening at one end for entrance of the electors and an opening at the other for their exit."

No attempt is made in this opinion to deal with the question in voting machine counties.

April 9, 1952—052-120.

CIVIC GROUP—REGISTERED VOTERS—TICKETS— DISTRIBUTION

STATEMENT and QUESTION: A civic group wishes to in-

crease public interest in the forthcoming Democratic primary. "This group plans to print tickets and in some manner distribute them to every registered voter. The tickets will bear duplicate numbers, and the voters will be instructed to deposit one end of the ticket in a container at or near their polling places. After the polls are closed, a drawing will be held and the lucky number will receive a \$100.00 war bond."

1. Does this plan violate any existing statute in Florida?
2. If not, could the receptacles be on the premises of the official polling places?
3. If question No. 2 is answered in the negative, could they be placed at some point adjacent to the polling places?

To: Honorable William H. Dial, County Attorney, Orlando, Florida:

AS TO QUESTION ONE

Your statement of the facts casts the inference that no charge is to be made for the tickets and no consideration furnished or received therefor. If such is the case, I know of no statute that would be violated by said plan.

AS TO QUESTION TWO

In my opinion the receptacles for the reception of the tickets should not be placed on the premises of the official polling places, which are established for the sole purpose of conducting elections and should not be used to conduct another enterprise along with the election.

AS TO QUESTION THREE

I know of no reason why the receptacles cannot be placed near the polling places. Sections 101.121 and 101.131, F.S., contemplate that, from the time of the opening of the polls until the completion of the count of the ballots and the certificates of the returns, nobody shall come within 15 feet of a polling place except the sheriff, a deputy sheriff, the election inspectors and clerk, watchers for political parties and candidates, and voters desiring to vote. It might become necessary for a member of the civic club to go to a receptacle during that period of time, in order to attend to or service it in some way. Therefore, it would be well to place the receptacles at least fifteen feet from the polling places.

September 17, 1952—052-274.

SPECIAL STATE PRIMARY—MUNICIPAL ELECTION— POLLING PLACES—SAME ROOM

QUESTION: Since the City of High Springs, Florida, is required to conduct its annual city election on the second Tuesday in October, which falls this year on October 14, and since the Governor has called a state-wide special primary for the same date, may polling places for both elections properly be located in the same room?

To: G. T. Alexander, City Clerk and Treasurer, High Springs, Florida:

Although my opinion was not sought on the point, it may be pertinent to refer to the provisions of §101.36, F.S., and to an Attorney General's opinion rendered in pursuance thereof.

Section 101.36, provides that "In counties where voting machines are adopted and used in state or county elections, they shall also be used by municipalities in any municipal election." In regard to that statute it was stated in my opinion 050-155, March 30, 1950, (Biennial Report of the Attorney General, P. 111) that "... if it is not practicable for the municipal authorities to procure voting machines for use at ... (a municipal) election, provision shall be made for the conducting of such election by means of paper ballots and ballot boxes." If, therefore, the county can not make available a sufficient number of voting machines for separate use in both elections, that is, if there are not enough machines for the city to have a proper number bearing its ballot and the county precinct to have a sufficient number bearing the state ballot, then the city shall have to provide for voting by paper ballots in the city election.

As to the use by the county and the city of the same room for a polling place, it is possible for such to be done, provided the requirements of the city ordinances regarding polling places and the state laws regarding polling places can be satisfactorily met. For example, §101.71, F.S., requires that for a precinct polling place there shall be railed off a space with an opening at one end for an entrance and an opening at the other end for an exit. Also, according to §101.53, a certain number of watchers must be allowed to be in the polling room but must not be permitted to come closer than fifteen feet from the official's table or from the voting machines. Section 101.37, requires that the exterior of the voting machine and every part of the polling room be in plain view of the election officers. Other requirements specify the location of the machines in relation to the walls of the room and in relation to the official's table and prescribe the number of machines which must be in operation for a precinct of a particular size. (See §§101.37 and 101.33, F.S.).

Similar requirements in regard to polling places may exist in the ordinances or charter provisions of High Springs which would have to be observed.

In view of the above considerations it is my opinion that your question should be answered as follows:

There is no obstacle to the locating of a polling place for a municipal election and a polling place for a state-wide special primary election in the same room, provided that the room is large enough for each election to be conducted on a distinctly separate basis, that the requirements of all pertinent ordinances and statutes are complied with fully in the separate organization of the voting paraphernalia in the room, and provided that the room is made available to both city and county authorities.

May 1, 1951—051-98.

MUNICIPAL ELECTIONS—SIGNATURE IDENTIFICATION SLIPS—INSPECTION

QUESTION: May a county solicitor inspect signature identification slips executed in a municipal election where voting machines were used, under the provisions of §100.38, F. S., 1949?

To: *Honorable Otis Farrington, County Solicitor, Broward County, Ft. Lauderdale, Florida:*

Recently an election was held in a municipality in Broward

County, Florida, which county has adopted the use of voting machines; and such machines were used in said election. This was in accord with §100.43, F. S., unless this provision of law has been changed by legislation specifically applicable to that municipality. It is assumed, however, that the section mentioned is controlling in the absence of information to the contrary.

The advice which this office properly may give to a public official is limited to questions concerning his duties under the law. Chapter 875, F. S., sets forth certain described offenses against suffrage. At least §875.15 is applicable to municipal elections (*Ex parte Senior*, 37 Fla. 1, 19 So. 652). Hence, it appears proper that this question be answered for the official asking it.

It is sufficient here to mention §§100.34 and 100.38, F. S., as relating to signature identification slips required to be executed and preserved where voting machines are used. Section 100.38 provides in effect that such identification slips and affidavits therein mentioned shall be delivered by the precinct election board to the supervisor of registration, "whose duty it shall be to carefully preserve same for the period of at least one year, subject, however, to inspection by any elector of the county, and to deliver the same to any prosecuting officer of the county, upon demand, after taking a written receipt therefor." We are here dealing with a municipal election. Hence, such identification slips and affidavits should be delivered to and preserved by the municipal officer who functions as registration officer of the municipality.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The solicitor of the Criminal Court of Record of Broward County, Florida, is authorized to inspect signature identification slips executed in connection with the aforesaid municipal election and now in the hands of the proper officer of such municipality. Further, such solicitor in connection with any legal duty imposed upon him as such officer, is authorized to demand of said municipal officer such slips or any thereof considered by him necessary in the discharge of any such legal duty, and such municipal officer is required to deliver same to said solicitor upon the latter executing and delivering to the municipal officer a written receipt thereof. Hence, the question is answered in the affirmative.

CONDUCTING ELECTIONS AND ASCERTAINING RESULTS

June 23, 1952—052-197.

SUPERVISORS OF FT. PIERCE BEACH EROSION DISTRICT—MEMBERS

STATEMENT and QUESTION: In the absence of any provision in Ch. 26200, Laws of 1951, creating the Fort Pierce Beach Erosion District, for nomination of members of Board of Supervisors of said district, several persons qualified in the 1952 primary at the time and in the manner prescribed by law for candidates for county offices and now purport to be the nominees chosen by a majority of the voting electorate of St. Lucie County. Section 4 of Ch. 26200, cited above, requires, however, that the members of

the Board of Supervisors be elected by the qualified voters of St. Lucie County who are freeholders within the designated limits of the Beach Erosion District, and makes no provision for nominations for such offices.

In view of the provisions of §4, Ch. 26200, Laws of 1951, what effect may be given to the nomination of candidates for membership on the Board in the recent primary election?

To: Honorable J. W. Sample, Attorney, Board of Supervisors, Ft. Pierce Beach Erosion District, Ft. Pierce, Florida:

Section 4 of Ch. 26200 provides that successors of the present members of the Board of Supervisors "... shall be elected by the qualified voters of St. Lucie County, Florida, who are freeholders within said District, but not necessarily residents residing therein ..."

Section 6 of the same chapter provides that: "The Board of County Commissioners of Saint Lucie County, Florida, is authorized and directed to provide a separate ballot for the use of the electors qualified to vote for the supervisors of Fort Pierce Beach Erosion District ...". §7 requires that the persons receiving the highest number of votes for the offices in question shall be declared elected. Section 38 of Ch. 26200 is as follows: "All laws and parts of laws in conflict herewith are hereby repealed."

In opinion 050-130, dated March 17, 1950, a situation similar to that here presented was considered. The statute which created the East Volusia County Anti-Mosquito District made no provision for nomination of the district commissioners by a primary but required them to be elected at the general election. In the opinion it was stated that "... This is not an election which permits the qualifying of candidates in the primaries. It is a freeholder election. The names of the candidates to be voted for will not appear on the general election ballot ... There appears to be no provision of law providing for the printing of the names of candidates for these offices on the ballot to be used at such election. In the absence of such provisions, the ballot will be provided to permit the writing in of names of candidates qualified according to the act ..."

Since the statements quoted immediately above are equally pertinent to the situation at hand, it is my opinion that your question should be answered as follows:

There not being provided a means of nominating candidates for the Board of Supervisors of the Ft. Pierce Beach Erosion District and there not being a provision for the printing of the names of candidates on the special ballot to be voted by the freeholders of the District, all votes cast on said ballot shall be written in by the electors qualified to vote the ballot. The special ballot should be so prepared as to indicate that all of the persons receiving such write-in votes must be freeholders in the district and that at least two of the Board memberships must be filled by freeholders who reside in the District. (§7, Ch. 26200, Laws of 1951). There is no authority for the election of the Supervisors by any method other than that herein indicated; and nominations for said offices which

are erroneously made in a primary election are of no effect whatsoever.

September 14, 1951—051-316.

COUNTY EXECUTIVE COMMITTEE—FILLING VACANCY

QUESTION: When a vacancy occurs in the office of member of a county party executive committee, how is such vacancy filled?

To: Honorable D. H. Sloan, Jr., Clerk Circuit Court, Polk County, Bartow, Florida:

It is here assumed that there is no special act applicable in Polk County touching upon this subject. This opinion is conditioned upon such assumption.

Chapter 26870, Laws of 1951, designated in the act as "The Election Code of 1951," is a compilation and revision of the election laws of this state. It became effective on September 1, 1951; hence, that act is controlling with respect to this question. For the filling of a vacancy in a county party executive committee under the law as it existed prior to September 1, reference is made to §102.07, F. S.

Under revised and amended §103.111, F. S., as set forth in Ch. 26870, which, subject to certain exceptions, follows the law heretofore existing (§102.07), it is provided that in the first primary election in 1942 and each four years thereafter, members of the county executive committee, composed of a man and a woman from each precinct, should be elected. Such revised and amended Section further provides that, "In the event of no election of committeemen or committeewoman, or of a vacancy occurring from any other cause in any county executive committee, the chairman shall call a meeting of the county executive committee by due notice to all members and the vacancy shall be filled by a majority vote of the members of the county executive committee attending from among the members of the party residing in the precinct where the vacancy occurs."

The present democratic county executive committee in Polk County was elected at the primary in 1950. Any vacancy in said committee existing on and after September 1, 1951, is to be filled in the manner set forth in that part of revised and amended §103.111 quoted in the preceding paragraph. It is to be observed that there is no provision for filling such a vacancy for the unexpired term by election in the 1952 primary.

November 13, 1951—051-406.

ELECTION ON HOLIDAY—TOWN OF BALDWIN

QUESTION: Will it be proper to hold the 1952 general election in the Town of Baldwin upon the day prescribed by the legislature when that day, in 1952, happens to be January 1, a legal holiday?

To: Honorable O. R. T. Bowden, Attorney, Jacksonville, Florida:

Chapter 24387, Special Acts, 1947, provides that in the Town of Baldwin, "General elections shall be held on the first Tuesday

of January every two years . . ." Although there have been no Florida cases on this point, it has been held elsewhere that, "Statutes specifying the date of holding an election are ordinarily mandatory, and no election can be held at any other time except under valid and applicable statutes providing for special elections; and an election held on another day is void, unless its holding at a different date is compelled by a court of competent jurisdiction." 29 C. J. S. page 102.

In view of the authorities cited for the above quotation and the lack of evidence of judicial or legislative intent to the contrary in Florida, it is my opinion that the general election of the Town of Baldwin should be held on the first Tuesday of January 1952, as specified in the Special Act which re-created the Town of Baldwin. The question as herein construed should be answered in the affirmative.

PRESIDENTIAL ELECTORS; POLITICAL PARTIES; EXECUTIVE COMMITTEES AND MEMBERS

February 5, 1952—052-30.

PRIMARY ELECTION BALLOT—CANDIDATES—U. S. PRESIDENT AND VICE-PRESIDENT—OATHS— EXECUTIVE COMMITTEE RESOLUTIONS

QUESTIONS: 1. What is the final date for certifying to the Secretary of State the resolutions which are allowed by §103.121, F. S.?

2. Is it necessary that a candidate for president or vice-president who desires to have his name placed on a primary ballot pay a filing fee and file an oath with the Secretary of State?

3. May a state executive committee prescribe the names of candidates to be placed on the ballot?

4. Is there anything in the Florida Statutes which would prohibit this preferential primary for president from taking place in the first primary?

To: Honorable William C. Cramer, Representative, Pinellas County, St. Petersburg, Florida:

Section 103.121, F. S., allows a state executive committee, "... (9) to declare by resolution for the nomination of candidates ... for president and vice-president of the United States. Upon adoption of a resolution, and upon service of a certified copy thereof upon the secretary of state, within the time required for filing sworn statements by candidates, the names of candidates for such offices ... shall appear upon the official primary election ballot ..."

It is my opinion that the questions should be answered as follows:

(1) The "time for filing sworn statements by candidates" in Florida is on or before March 15 of any year in which a primary election is to be held, unless one is a candidate for a certain specifically excepted office, in which case such a candidate might be

required to file his statement on or before February 1 of an election year. Since a specific filing date is not mentioned in §103.121, and since in the absence of a pertinent statutory provision March 15 is the last day upon which a candidate may file his sworn statement, it must be assumed that if a state executive committee submits the resolution to the Secretary of State prior to noon on March 15, there will be ample compliance with the quoted portion of §103.121.

(2) Since the method of entering a candidate's name on a preferential ballot has not been regulated by the state legislature, and since the existent regulations as to the filing of candidates' oaths and the payment of filing fees do not appear to apply to a candidate for the office of president, it must be assumed that the legislature intended to leave the question of whose names should appear on a preferential ballot to the discretion of the party's state executive committee. The committee should in the resolution which it certifies to the Secretary of State, include such restrictions as it deems necessary to insure that only the names of those party members who are qualified to be president may appear on the ballot.

(3) Only those candidates for nomination to office of President or Vice-President who perform the duties which are prescribed in the committee's resolution should be permitted to have their names placed on the official primary ballots of the party. All candidates would have to comply with the requirements of the resolution prior to noon on March 15 of an election year.

(4) There is nothing in the Florida statutes which would seem to confine the preferential primary discussed herein to the second primary election. But since the procedure to be followed in holding such a primary is not clearly defined in the statutes, a final determination of the proper procedure must derive from a further statement by the legislature or a judicial declaration.

September 17, 1951—051-320.

PARTY CONGRESSIONAL EXECUTIVE COMMITTEES— ABOLISHMENT—FUNDS

QUESTION: In view of the provisions of revised and amended §103.111, F. S., as set forth in Ch. 26870, Laws of 1951, at this time may the Chairman and Secretary of the Congressional Democratic Executive Committee for the Third District heretofore existing, deliver the funds of said committee to the State Democratic Executive Committee?

To: *Honorable M. E. Tolson, Chairman, Democratic Executive Committee, Tallahassee, Florida:*

Chapter 26870 is an amendment and revision of all those chapters of Florida Statutes relating to registration of electors, general, primary and other elections, etc., and is designated as the "Election Code of 1951." Section 11 of Ch. 26870 provides that the act shall take effect September 1, 1951. Section 9 of Ch. 26870 repeals Chs. 105, 106 and 875, F. S., together with sections or parts of sections of Chs. 97, 98, 99, 100, 101, 102, 103 and 104, F. S., not revised or brought forward in the act.

Heretofore, §102.07, F. S., named and provided for election of members to three party executive committees; namely, state, congressional and county. It is assumed that in pursuance of former §102.07 (2), F. S., the members of the Congressional Democratic Executive Committee for the Third District were elected at the 1950 primary, as such district then existed.

The Election Code of 1951 in amended §103.111, F. S., therein, names only *two* party executive committees; namely, state and county. Subsection 103.111 (4) provides:

"The members of the state executive committee from each congressional district under the vice-chairman from such district shall perform all duties usually handled by congressional district committees if authorized."

Amended §103.121 in the Code, among other things, provides the offices with respect to which the county committee shall have exclusive power to levy assessments on candidates and that "the state executive committees shall have exclusive power to levy all other assessments authorized."

In view of these provisions it appears that on September 1, 1951, congressional party executive committees were abolished. Since a statutory public office may be abolished at any time by the Legislature (*City of Jacksonville v. Smoot*, 92 So. 617) there would appear to be no constitutional impediment to such legislative action with respect to congressional party executive committees.

It further appears that since from and after September 1, 1951, the state executive committee through its members, as designated in above quoted §103.111 (4), shall function in the place of congressional committees, funds now in the hands of congressional executive committees should be delivered to the state party executive committee.

Hence, the above question is answered in the affirmative.

November 27, 1951—051-435.

CANDIDATES—PARTY EXECUTIVE COMMITTEE ASSESSMENTS—DISTRIBUTION

QUESTION: Where a Circuit Judge, State Attorney, State Senator, or Member of the House of Representatives, whose circuit or district comprises only one county, qualifies with the Secretary of State, should the Committee Assessment be remitted to the State Executive Committee, or to the County Executive Committee in which the circuit or district is located?

To: *Honorable R. A. Gray, Secretary of State:*

Section 99.061, Election Code of 1951, provides that candidates for the offices questioned shall pay their party assessments to the Secretary of State when they qualify. The party assessments are authorized by §103.121, which states in part that "... the County Executive Committee shall have exclusive power to levy assessments upon candidates to be voted for in a single county except state senators and the state executive committees shall have exclusive power to levy all other assessments authorized . . ."

It is my opinion that the committees authorized to levy the assessments are entitled to receive them, and that the assessments collected from the candidates for the positions mentioned, not including state senator, should be remitted to the county executive committees when all the votes cast for such candidates will be in one county. Assessments collected from candidates for state senator should be remitted to the state executive committee.

December 21, 1951—051-475.

COUNTY EXECUTIVE COMMITTEE—ELECTION DISTRICTS—RELOCATION

QUESTION: What is the effect of the recent extensive changes in the boundaries and numbering of election districts in Pinellas County upon the members of the County Executive Committees in said County?

To: *Honorable Charles E. Fisher, Chairman, Republican Executive Committee, Pinellas County, St. Petersburg, Florida:*

Although this question has not been presented since the enactment of the Election Code of 1951, it has been in this office before that time; and it is on two such previous opinions that I shall rely for the basis of the reasoning in this opinion and for the sake of consistency. Those opinions may be found in Attorney General's Report, 1947-48, page 103, No. 048-6, and in Attorney General's Report, 1949-50, page 125, No. 050-41.

The law relative to filling vacancies on county executive committees which was in force at the time those two opinions were rendered was designated as §102.07 (4), F.S. Under that section vacancies in county committees were to be filled by the chairmen of the State Executive Committee of each party.

The opinion in the 1947-48 Report of the Attorney General was rendered during the administration of my predecessor, Honorable J. Tom Watson. The gist of that opinion was that the effect of an election district boundary change upon the status of members of a County Executive Committee was a matter primarily of interest to the party organization and should be handled within the party along certain suggested lines.

The Watson opinion was overruled to some extent by me in the opinion referred to in the 1949-50 Attorney General's Reports. Under the law which existed then I felt the matter was one of such interest and import that its consideration should not be confined to the party concerned, to be dealt with, perhaps, in different manners by different parties, but should be dealt with under a rule applicable to all parties. In the absence of any legislative or judicial action on the matter, I chose as such a rule that which in my opinion was the better of the two courses suggested by my predecessor as possible results of the parties' decision as to how the matter should be handled.

That rule was that a change in the boundary of an election precinct, the change of the number of a precinct presenting no difficulty, created a vacancy in that precinct. That is, the committee-men elected from that precinct would have to be reappointed or

some others appointed by the Chairman of their State Executive Committee, as provided in §102.07 (4), F.S.

Since opinion No. 050-41 was rendered, the law concerning the method of filling vacancies in a County Executive Committee has been changed. Section 102.07 (4), F.S., has been revised, and, as renumbered, it appears in the Election Code of 1951 as §103.111 (3). The law now provides that in the event of vacancies on a County Executive Committee, the remaining members of the Committee shall elect, from among the party members of the precinct which is not adequately represented on the party's County Committee, a person or persons to fill the vacancy.

Since the enactment of §103.111 (3), Election Code of 1951, it is not feasible that the rule of opinion No. 050-41, referred to above, be continued although it appeared to be the most reasonable rule at the time it was made. If it were to be held now that vacancies existed in the offices of all those County Executive Committee members who were elected from precincts the boundaries of which had been changed, it might conceivably be possible under §103.111 (3), Election Code of 1951, for some six or eight county committeemen to fill some 160 vacancies on the County Committee of their party. Or and yet more absurd, it might well be that all the precincts in a county should have their boundaries changed, in which event there would be vacancies in all the positions on the County Committees of all parties until the next appropriate election.

Such a course of events could not conceivably have been the intent of the legislature in passing §103.111 (3). Nor may it be assumed that the legislature was unaware that the eventualities mentioned could obviously become fact, thus denying the people of the county so affected the representation in their party's affairs to which they were entitled.

When a relocation of election districts is conducted in a county in the manner prescribed by law, such changes in the boundaries of election precincts as may result shall be prospective as to all members of County Executive Committees, shall create no vacancies on such Committee, and shall not require any change in the number of members until the expiration of the respective terms for which they were elected. The County Executive Committees shall operate, in all respects, as though there had been no change in the boundaries of any precinct and as though the precincts existed as they did when the members of the Committee were last elected. Such a solution is the only one which the Legislature could have intended under the present state of the law.

May 12, 1952—052-153.

SECRETARY OF STATE—DUTY—CANDIDATES—RESOLUTION NO. 8, STATE EXECUTIVE COMMITTEE

QUESTION: What are the powers and duties of the Secretary of State in connection with Resolution No. 8, adopted by the State Democratic Executive Committee on January 5, 1952, dealing with placing in the 1952 primaries for nomination the five members of the State Road Department, Director of the Beverage Department, State Motor Vehicle Commissioner, the three members of

Florida Industrial Commission, the Hotel Commissioner, the five members of the State Racing Commission, the five members of the Game and Fresh Water Fish Commission, and Assistant State Attorneys?

To: Honorable R. A. Gray, Secretary of State:

It is recognized that all the above positions mentioned are appointive offices with the possible exception of the position of Hotel Commissioner, designated an employee and not an officer by §509.021, F.S. In view of the wording of §103.121 (9), F.S., quoted below, and the context of this opinion, whether the last-named position is a public office or one of employment seems immaterial.

It is here assumed that the purported authority for adoption of such resolution derived from said §103.121 (9), which is quoted as follows:

"(9) to declare by resolution for the nomination of candidates for other than elective offices, and for president and vice-president of the United States. Upon adoption of a resolution, and upon service of a certified copy thereof upon the secretary of state, within the time required for filing sworn statements by candidates, the names of candidates for such offices and positions shall appear upon the official primary election ballot. The form of the ballot shall correspond to the form prescribed in §101.141." (Emphasis supplied.)

It is quite apparent that this piece of legislation was adopted from former §102.35, F.S., which came down to us as §28 of the original primary law (Ch. 6469, Laws of 1913) which is quoted as follows:

"The state executive committee of any political party, may, by resolution, declare for the nomination of candidates for other than elective offices, and also for the election of national committeemen, delegates to national political conventions, and for president and vice-president of the United States. Upon the adoption by such committee of a resolution for the nomination or election of any such additional candidates or delegates, and upon service of a certified copy thereof upon the secretary of state, within the time required for filing sworn statements by candidates, the names of candidates for such offices and positions shall appear upon the official primary election ballot. The form of ballot shall correspond in all respects to the form herein prescribed."

For many years during which the offices of circuit judge, state attorney, judge and solicitor of criminal courts of record were appointive offices, provision was made by the State Democratic Executive Committee for Democratic candidates to run for nomination for these offices in the primary. Yet it was not until the adoption of Ch. 19007, Laws of 1939, and Chs. 20619 and 20850, Laws of 1941, that the legislature specifically provided for nominations for appointment to such mentioned offices. It is here assumed that authority for candidates participating in the primary for these of-

fices prior to adoption of such laws must have derived from committee action in pursuance of above quoted former §102.35. In connection with these former appointive offices, it is relevant to mention the case of *State ex rel. Taylor vs. Gray*, 25 So. 2d. 492.

The case referred to was a mandamus action in our Supreme Court wherein Taylor, who had qualified with the Secretary of State for the then appointive office of solicitor of the Criminal Court of Record of Dade County, sought to require such state officer to certify that he was the only candidate who had properly qualified since one, Jones, had attempted to qualify but had failed to pay the amount of the required qualifying fee. The court ruled that a legal duty devolved upon the Secretary of State to certify Taylor as the only qualified candidate for such office. Mr. Justice Buford dissented, holding in effect that no such legal duty devolved upon the Secretary of State, for the reason that there was involved an appointive office and that the scheme sought to coerce the Governor with respect to his constitutional duties in filling the office.

Whatever the custom may have been with respect to these offices of circuit judge, state attorney, judge and solicitor of criminal courts of record prior to the adoption of Chs. 19007, 20619 and 20850 (former §§102.36, 102.66 and 102.67), apparently doubt of the legal propriety of these offices being thrown into the primary must have actuated the adoption of such laws. Now, without any such statutes to implement the above underscored wording of §103.121 (9), it is sought to extend that custom to the indicated wide field of appointive offices not in a coordinate branch of state government but in the executive branch,—offices intimately related to each Governor and to the character and quality of his administration.

It is elementary that the right of franchise under the American system is not an inherent one; and except as to certain offices (United States Senators and Representatives) that right derives from the states. Whether in Florida an office is an appointive or elective one depends upon the provisions of our state organic and statutory laws. It is assumed that it was the considered judgment of our Legislature in creating the offices here involved that in the interest of public welfare they should be appointive and not elective ones. Implicit in the exercise of such legislative wisdom is the firm assumption that the Governor shall, under his constitutional powers, fill such offices with citizens available therefor of such character and ability to insure the most beneficial administration thereof; and any attempt to coerce the Governor in the exercise of such power offends his constitutional prerogatives with respect thereto.

As explained hereinafter, the response to above Resolution No. 8 on the part of candidates in the 1952 primaries has been negligible. Nevertheless, the obvious intent of the resolution was to precipitate full scale political contests for these appointive offices. Indeed, to accomplish the purpose of the committee such was required. Granting that intent, had there been such response certain factors would have come into play: (1) Political campaigns, some statewide, others to restricted but large areas of the state, involving necessary expenditures of considerable sums by contestants for these offices in the nature of qualifying fees and campaign expenses. (2) The reasonable belief of contestants for these offices who may have thus

participated that primary election results would be recognized and honored by the Governor; without which assurance persons reasonably would not expend the time, money and effort in such contests. (3) Once said appointive offices were made subjects of such campaigns, the pressure of the participating electors that the Governor respect the results thereof. (4) Implicit in such campaigns, the pressure of the state committee of the Governor's own political party that he be bound by the results thereof. Such factors would be coercive to the extent of being inimical to the unrestricted right of the Governor under the Constitution to fill these offices by appointment in the interest of public welfare as intended by the Legislature.

Further, the "Election Code of 1951" contains no specific statutes in relation to these offices similar to the noted provisions of old §§102.36, 102.66 and 102.67. Unless the Legislature shall again implement the underscored general provisions of §103.121 (9) with legislation specifically requiring that nominees for the appointive offices here involved should be selected in the primaries, grave doubt exists of the efficacy of §103.121 (9) as the basis for such action by the committee.

The response of the public, generally, to Resolution No. 8 in the 1952 primaries, has been most negligible. The following number of persons qualified for the respective offices mentioned: (1) One person for the office of Assistant State Attorney, Fifth Judicial Circuit. (2) One person for the office of Assistant State Attorney, Eighth Judicial Circuit. (3) One person for the office of member of State Road Department from the Third District. If there is any efficacy in these persons so qualifying for such positions, since they had no opposition, they are declared nominated to the appointive offices for which they respectively qualified (\$99.041, F.S.)

The provisions of Resolution No. 8 offend the constitutional power of the Governor to freely and without coercion fill these mentioned offices by appointment. Hence, it is suggested that upon application to the Secretary of State by these three persons who qualified for the mentioned appointive offices, that such officer refund to them the qualifying fees paid respectively by them.

May 27, 1952—052-163.

COUNTY EXECUTIVE COMMITTEE—FILLING VACANCY

QUESTION: What constitutes a quorum of the members of a county political party executive committee for the purpose of filling vacancies in membership on the committee, as provided by §103.111 (3), F.S.?

To: *Honorable John P. Booth, Chairman, Republican Executive Committee, Dade County, Miami, Florida:*

The pertinent part of the subsection mentioned is quoted as follows:

"In the event of no election of committeemen or committeewomen, or of a vacancy occurring from any other cause in any county executive committee, the chairman shall call a meeting of the county executive committee by due notice to all members *and the vacancy shall be filled by a majority vote of the members of the county executive*

committee attending from among the members of the party residing in the precinct where the vacancy occurs." (Emphasis supplied.)

The request for opinion points out that §103.121 (10), F.S., provides: "(10) and a quorum shall be a majority of those elected." Section 103.121 sets forth specific powers and duties of party executive committees, and the quoted subsection thereof relates to such a committee functioning with respect to such enumerated powers and duties. That quoted subsection does not apply to the filling of vacancies on such a committee, which function of the committee is governed by the above-mentioned pertinent part of §103.111 (3).

A quorum of the members of a county political executive committee duly convened for the purpose of filling vacancies in membership on the committee is the number of members attending such a meeting, in pursuance of notice given by the chairman, as required by the above-quoted portion of §103.111 (3), F.S., whether or not such members attending constitute a majority of members of the committee.

October 29, 1952—052-301.

COUNTY PARTY EXECUTIVE COMMITTEE-VACANCY— LOYALTY OATH

QUESTIONS: 1. When a precinct committeeman "moves out of the precinct he represents may he still act as a qualified member" of his county party executive committee?

2. Must an appointee to a party county executive committee "qualify by taking a non-communist oath, and the oath to support the Democratic Party and nominees, as required of a candidate for election to the Executive Committee?"

To: *Honorable Murry Goodman, Attorney, Democratic Executive Committee, Dade County, Miami, Florida:*

The words in the first question, "moves out of the precinct he represents", are construed to mean the removal of legal residence from such precinct.

Section 103.111 (2), F.S., provides in part that, "The county executive committee of each political party shall consist of two members, a man and a woman, from each precinct within the county, who shall be elected for four years . . ." Section 103.111(3) provides in part, "In the event of no election of committeemen or committeewomen, or of a vacancy occurring from any other cause in any county executive committee, the chairman shall call a meeting of the county executive committee by due notice to all members and the vacancy shall be filled by a majority vote of the members of the county executive committee attending from among the members of the party residing in the precinct where the vacancy occurs."

Reasonably these provisions of law contemplate that a vacancy occurs in membership on such committee if a member moves his or her legal residence out of the precinct from which such member was elected. This position finds support in opinion 048-216 (1947-48

Biennial Report, 83) of my immediate predecessor in office. Also it is to be noted that implicit in our former opinion 051-475 of December 21, 1951, is recognition of the principle that a vacancy occurs in the membership of such a committee if a member moves his or her legal residence from the precinct from which they were elected. While we are here dealing with a "party" office as distinguished from a "public office, attention is directed to the provisions of §114.01 (4) F.S. Generally on this subject see School District No. 16, etc., v. Wolf (Kas.) 98 Pac. 237; Mauck v. Locke (Ia.) 30 N. W. 566; Frazer v. Miller, 12 Kas. 460.

The form of candidate's oath prescribed by §99.021, F.S., among other things, provides that a person executing it "voted for a majority of the nominees of the party of which he is a member at the last general election and that he pledges himself to vote for a majority of the nominees of such party whose names shall appear upon the ballot at the next general election." There is no statutory requirement that a person selected, in the manner prescribed by §103.111 (3), must take said oath. However, with respect to the qualifications of such a selectee to fill a vacancy, it is not considered that the wording in §103.111 (3), "from among the members of the party residing in the precinct where the vacancy occurs", is exclusive as to that feature. Section 103.121 (1), (2) and (7) provide, respectively, that such a committee may adopt a constitution by two-thirds' vote of the full committee; may adopt such by-laws as the committee may deem necessary by majority vote of the full committee; and may do anything that is considered by custom and practice as proper for party committees.

It was held in opinion 050-62 (1949-50 Biennial Report, 595) that a candidate for the office of member of a political party committee should subscribe to and file the loyalty oath prescribed by §876.05, F. S. In view of the reasoning found in that opinion and the provisions of §876.05, et seq., it appears that a person selected to fill a vacancy on a county party executive committee should execute such oath.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) When a member of a county party executive committee moves his or her legal residence from the precinct from which elected, such removal occasions a vacancy in the office involved, to be filled as set forth in §103.111 (3), F.S.

(2) A person selected to fill such a vacancy may be required, as prerequisite to assuming the party office, to subscribe to an oath containing such parts of the candidate's oath prescribed by §99.021 as said committee may deem appropriate. That requirement may derive from a provision of the committee's constitution or from a by-law of the committee, adopted in the manner set forth above herein. Since we have these specific provisions for adoption of a constitution and by-laws, no time is here spent laboring the question of whether or not a committee, under its inherent powers unregulated by statute, may accomplish the same purpose by resolution. Further, as a prerequisite to assuming the duties of the party office, a person selected to fill such a vacancy should subscribe to the loyalty oath required by §876.05, F.S.

June 19, 1952—052-193.

PRIMARY ELECTIONS—OFFICES OF J. P. AND
CONSTABLE—FAILURE TO QUALIFY

QUESTION: When no persons qualified in the 1952 primaries as Democratic candidates for Nomination for the offices of Justice of Peace in a certain numbered district, and Constable in another numbered district, in a county, and the Democratic Executive Committee of the county has purported to nominate candidates for such offices, lawfully may the Board of County Commissioners of the county have the names of such candidates printed on the 1952 general election ballot?

To: Honorable Cecil A. Rountree, County Attorney, Chipley, Florida:

Prior to the adoption of the Election Code of 1951 our primary election laws then existing made it very clear that political parties within the purview of the law were required to select their candidates for public office in the primary. In construing such prior effective law in relation to this point, our court held in *State vs. Tyler*, 100 Fla. 1112, 130 So. 721, that the general purpose of such primary laws was to preclude nominations by conventions, party committees, and the like, and to require nomination by direct vote of the people.

Attention is directed to §102.48, F. S., as it existed at and prior to the effective date of the Election Code of 1951. Provision was therein made for procedure to be followed to fill a vacancy in nomination occurring between the primary and general election. The court held in *State vs. Tyler*, *supra*, that said procedure was available to fill such a vacancy, provided there had been a nomination in the primary; and that no vacancy in nomination existed within the meaning of prior §102.48 if no nomination had been made in the primary.

On these points the Election Code of 1951 is not as clear as the law it supplanted; yet such is to be construed as the intent of the present law. The Democratic Party is a political party within the meaning of our present laws (§97.021 (6) (b), F. S.) Candidates of that party were required to be nominated in the 1952 primaries for the offices of Justice of Peace and Constable in the several counties (§§99.061, 100.061 and 100.091, F. S.; Art. XVIII, §10, Florida Constitution).

The Board of County Commissioners is required to cause to be printed "on ballots to be used in their county at the next general election the names of candidates who have been nominated and qualified" (§100.051, F. S.). Now, obviously, these quoted words refer to candidates nominated in pursuance of law.

We have held that neither §100.111, F. S., nor any other provision of our election laws provide for filling "vacancies in nomination" as distinguished from furnishing candidates in event "vacancies in office" occur. (See our opinion 052-131, as modified by opinion 052-188). Nevertheless, the effect of such opinion, as modified, is that in event of a "vacancy in nomination," as explained above herein, candidates may be furnished by interested

political parties by special primaries called by the appropriate executive committee. (See attached copy of opinion 052-188.)

Since there did not exist vacancies in nomination for the offices of Justice of Peace and Constable in the county, as above explained, the executive committee had no legal authority to make the nominations for these offices, as set forth and described in the question. Hence, the Board of County Commissioners of said county is not legally authorized to have printed on the 1952 general election ballot names of such persons so attempted to be nominated for said offices.

June 25, 1952—052-199.

EXECUTIVE COMMITTEES—POWERS AND DUTIES— CONTRIBUTIONS

QUESTIONS: 1. From what sources may a state or county party executive committee properly derive funds to be contributed to or expended on behalf of a candidate who has received the same party's nomination for a political office in the State of Florida?

2. By what method may such funds be contributed to or expended on behalf of a party nominee?

3. To what extent is §99.161, F. S., applicable to a candidate who has received the nomination of his party and who is campaigning for election in the general election to be held in November of this year?

To: *Honorable E. G. Ridinger, Chairman, Pinellas County Democratic Executive Committee, St. Petersburg, Florida:*

Honorable Charles E. Fisher, Chairman, Pinellas County Republican Committee, St. Petersburg, Florida:

Section 103.121, F. S., provides in part that: "The state and county executive committees shall have the following powers and duties:

"... (6) to conduct campaigns for party nominees,
"(7) to do anything that is considered by custom and practice as proper for party committees,

"(8) to make assessment it requires of candidates for the purposes of meeting their expenses or maintaining their party organization, not later than January 15th of each year in which a general election is held"

Section 99.161 (4) (a) requires, however, that: "No contribution or expenditure of money or other thing of value, nor obligation therefor, shall be made, received, or incurred, directly or indirectly, in furtherance of the candidacy of any candidate for political office in the State of Florida except through the duly appointed campaign treasurer or deputy campaign treasurers of the candidate."

Assuming that it is the custom and practice of executive committees to expend or contribute some part of the assessments levied on party candidates for the purpose of furthering the candidacies of party nominees, it cannot be further assumed that such

expenditure or contribution may be made with complete disregard for police regulations enacted in an attempt to control the evils attendant upon uncurbed campaign expenditures. Although possessed of a peculiarly autonomous status in our governmental procedure, a political party organization is equally as susceptible to general police regulations as is any other organization of individuals. A state or county executive committee, though expressly granted the power to conduct campaigns for party nominees, and to do such other things as are customary for party committees, must, in so doing, conform to the same regulations as are prescribed for all persons or groups of persons who assist a candidate in the furtherance of his candidacy.

Hence, a county or state executive committee, in conducting the campaigns of one or more party nominees, may do such things as are considered proper by custom and practice for political party committees, provided such acts are performed within the limits imposed by law. Since the law of Florida does not regulate the manner in which committee assessments may be expended, other than to say that they may be used to defray expenses and maintain the party organization, and since the power is granted a committee to conduct campaigns and perform other customary functions of party committees, those functions necessarily involving expense and contributing to the maintenance and growth of the party, it is my opinion that the questions submitted should be answered as follows:

(1) A state or county executive committee of a political party in Florida may contribute to the campaign funds of party nominees, or in other ways expend money on behalf of such nominees, provided such money is derived from the following sources:

(a) Reasonable profits realized from some commercial project or function sponsored by the committee, when such profits are a fair return for the services, goods, or accommodations made available and are not in the nature of indirect contributions, may be contributed to individual candidates, at the discretion and in the name of the committee.

(b) A committee may contribute or expend on behalf of a candidate funds contributed to the committee by party members only when the candidate receiving the benefit accepts or authorizes the contribution or expenditure, reports the exact amount contributed, and reports the name and address of the original donor in the manner prescribed by law. The original donor must expressly authorize that his contribution can be given by the committee to a candidate, and in no event shall a donor contribute more than one thousand dollars to any one candidate. A party committee cannot properly serve as a conduit through which indirect and unreported contributions may be made to a candidate.

(c) A state or county executive committee may expend or contribute, in its own name, the party assessments collected by it from party candidates for

nomination for the purpose of furthering the candidacies of one or more of the party nominees.

(2) All such contributions or expenditures, from permissible sources as above described, which may be made to or on behalf of any candidate, must have been previously authorized by the campaign treasurer of the candidate benefited in accordance with the law and all contributions of money or other things of value received by a candidate must be accepted and reported by him in the manner prescribed by law. No contribution by any committee to any candidate shall exceed one thousand dollars.

(3) The answer to this question having been considered in opinion 052-141, a copy of that opinion is enclosed.

ELECTION CODE; VIOLATIONS; PENALTIES

July 5, 1951—051-198.

COUNTY COMMISSIONERS—APPROPRIATION— INVESTIGATIONS—VIOLATIONS

QUESTIONS: 1. What legal changes, if any, will be effected with respect to the wording of §100.40, F. S., as it now exists, by §104.42, F. S. (part of Ch. 26870, Laws of 1951 (Election Code of 1951), which becomes effective September 1, 1951?)

2. What will be the effect of the provisions of the Election Code of 1951 establishing a permanent single registration system (§§98.041-98.151, F. S., as set forth in §2, Ch. 26870, Laws of 1951) in relation to an existing permanent registration system heretofore established in Dade County by an act applicable only to that county?

To: Honorable Carl Holmer, Jr., Supervisor of Registration, Dade County, Miami, Florida:

Chapter 26870, Laws of 1951, amends and revises Chs. 97 to 104, both inclusive, F. S.; and in the chapter is designated, "The Election Code of 1951." Hereinafter it is referred to as the "code." The act takes effect on September 1, 1951. Thus, until such date, the election laws of this state other than those contained in the code are in force and effect. Unless otherwise indicated, the sections of law mentioned herein refer to Florida Statutes, 1949, as distinguished from the amended and revised sections and chapters composing the code.

Section 100.40 provides that, "In all counties where voting machines are used the board of county commissioners, in preparing the county budget, *shall* include therein an appropriation not in excess of the sum of five thousand dollars, for the purpose of investigating fraudulent registrations and illegal voting." Section 104.42 of the code provides, "The board of county commissioners in all counties *may* appropriate not in excess of five thousand (\$5,000.00) dollars for the purpose of investigating fraudulent registrations and illegal voting," (The underscored words in the two quotations are supplied).

The request for opinion recites, in effect, that in pursuance of §100.40, it has been the custom, and considered necessary, for the

officer to whom this is addressed to obtain the services of a competent person to make the investigations contemplated by §100.40. It is assumed that compensation for such an investigator has been authorized and provided in the county budget as required by said section.

Two differences are apparent between the provisions of §100.40 and §104.42 of the code: the former applies only in voting machine counties, the latter applies to all counties; and the underscored word "shall" is used in above-quoted portion of §100.40, as against the underscored word "may" as the same appears above in quoted portion of §104.42 of the code. It would appear that §100.40 mandatorily required the county commissioners to annually provide in the county budget up to \$5,000 to defray expense of the investigations required by the section. For the reasons next recited, it would appear that under §104.42 of the code, there is no mandatory requirement purpose mentioned, but that the appropriation of such funds is permitted.

It is recognized that where the word "may" is found in a statute in connection with authority of public officers, it may be construed as mandatory or directory, depending upon the legislative intent evident in the statute. Then there is the general rule that "where a statute says a thing 'may' be done by a public official which is for the public benefit, it is to be construed that it must be done." *Seaboard Air Line Ry. Co. v. Wells (Fla.) 130 So. 587, 593.* However, §104.42 of the code is a revision of §100.40; and, in relation to the appropriation of funds for the investigation purposes mentioned, it is assumed the legislature with full knowledge changed the "shall" to "may."

Sections 98.041 to 98.151, both inclusive, in the code, set up, with certain revisions, the registration system now provided by Ch. 97, F. S. Section 97.01 sets forth, in part, that, "There is provided for the several counties of this state, except those counties mentioned in Section 97.12," the registration system found in Ch. 97; and such system is required to be established in the several counties not so excepted by January 1, 1960. Section 97.12 provides that, "This chapter is not required to be applied in those counties in this state which now have, or which may have before January 1, 1960, a permanent registration system in pursuance of special laws or population acts applicable to a single or limited number of counties." Also in this connection attention is directed to §97.14. The intent of these provisions is so obvious as to need no elaboration. However, as these revised matters are set forth in the code, the legal effect is different.

Section 98.041 of the code sets forth that the permanent single registration system, identified in §§98.041-98.151 of the code, "is provided for the several counties except those mentioned in §98.141;" and that such system shall be established in the several counties on or before January 1, 1960. Section 98.131 provides, in part, that, "on and after January 1, 1960, electors shall not participate in elections if they are not registered in the permanent registration system." Section 98.141 provides: "Counties which have or may have adopted a permanent registration system before January 1, 1960, under authority of special or population acts, if in the

opinion of the Secretary of State they substantially comply with the requirements of the state permanent registration system, may upon resolution of the board of county commissioners, adopt this law as the basis for their system without re-registration."

In view of the foregoing, in my opinion the above questions are answered as follows:

1. Under present §100.40, there is the mandatory requirement that in counties using voting machines the county commissioners shall include in the county budget an appropriation not in excess of \$5,000, for the purposes of investigating fraudulent registrations and illegal voting. Under §104.42 it is permissive, but not mandatory, for said county commissioners to include in the budget funds for the purposes mentioned. Thus, in Dade County, the custom of employing a person to make such investigations may be continued, provided, the county commissioners see fit to provide for expenditure of funds for such purpose in the annual county budget.

2. It is assumed that between now and January 1, 1960, registrations in Dade County will continue to be controlled by the permanent registration in pursuance of the present law applicable in that county, or as the same may be amended, unless prior to such date the permanent registration system set forth in the code is adopted. Conditioned upon such assumption, and under the provisions of the code *as it now exists*, if between September 1, 1951, and January 1, 1960, the board of county commissioners of that county shall by resolution adopt §§98.041-98.151, both inclusive, of the code, as the basis for the registration system in the county, and the Secretary of State shall determine that the system then and theretofore controlling in said county substantially complies with the requirements of the system set forth in the code, no necessity shall exist for a reregistration of electors in said county then registered under such county system. However, thereafter registrations in Dade County shall be controlled by said laws relating to the permanent system set forth in the code, and said laws shall control with respect to the registration system in said county. If the county commissioners shall not, prior to January 1, 1960, so adopt said resolution, or if such resolution is adopted and the Secretary of State should not find that the then existing Dade County system substantially complies with the system in the code, §§98.041-98.151 of the code would apply, and a complete reregistration of electors in said county would be required.

July 18, 1952—052-225.

ALCOHOL BEVERAGES—SALES DURING SPECIAL PRIMARY—PALM BEACH COUNTY

QUESTION: "Is §104.381, F. S., applicable in the event of a special primary called by a Palm Beach County Executive Committee to fill a vacancy in nomination for the office of Commissioner in County Commissioner's District No. 3; and if the statute does apply to such an election, should its prohibition be effective throughout the county or only in the district involved?"

To: *Honorable Harry A. Johnston, County Attorney, West Palm Beach, Florida:*

The above cited statute requires, in effect, that all places

within the area of an election which sell intoxicating beverages at retail shall be closed during the hours the polls are open or during the longer period indicated in the statute, if the County Commission so directs. Although intoxicating beverage is defined in §561.01 (8), F.S., as any beverage containing more than three and two-tenths per cent of alcohol by weight, it must be observed that §104.381, specifically allows package stores, as defined in §561.34 (3), F.S., to remain open.

Regardless of whether a place is required to be closed or permitted to remain open, §104.381, recites that the sale of all alcoholic beverages is prohibited. Alcoholic beverages are defined by §561.01 (7), F.S., as all beverages containing more than one per cent alcohol by weight.

The only indication in §104.381 as to the area throughout which the prohibition of the statute shall be effective is found in the words "... within the area of any state, county, or municipal, general, primary, or special election ...". The area of the special primaries which have been called in Palm Beach County being confined to Commissioner's District No. 3, it appears conclusively that the statute under consideration is only applicable in such district.

In view of the above considerations it is my opinion that your question should be answered as follows:

Section 104.381, F.S., does apply to a special primary election called by a party executive committee to fill a vacancy in nomination for a county office; and if such special primary is only required to be held in one of the commissioner's districts in the county, then the prohibition of the statute shall only be in effect in that district.

October 30, 1952—052-303.

MUNICIPALITIES—ALCOHOL BEVERAGES—SALES ON ELECTION DAY

QUESTIONS: 1. There having been enacted in the City of Apalachicola an ordinance which allows the Mayor in his discretion to declare, with certain exceptions, that it shall be unlawful for places which sell liquors, wines, and beers to remain open for the sale of such beverages on the day of an election, would it be lawful in view of the prohibition of §104.381, F.S., for such places to remain open for the sale of alcoholic beverages when the Mayor issues no proclamation requiring that they be closed?

2. Under the laws of Florida and the ordinance of the City of Apalachicola, which places for the sale of alcoholic beverages may remain open in such city on election day?

To: *Honorable C. H. Bourke Floyd, City Attorney, Apalachicola, Florida:*

Section 562.14 (3), F.S., provides that: "Incorporated cities or towns may by ordinance independently regulate the hours of sale of alcoholic beverages within the corporate limits thereof ...". This section permits incorporated cities to exempt themselves from the

statutory regulation of the hours of sale of alcoholic beverages. Thus, if a city desires to increase or decrease the number of hours during which alcoholic beverages are sold, it may do so by ordinance despite the requirements of the state law. This permission however, to so abrogate the effectiveness of the state law is expressly granted by the above quotation.

Section 104.381, prohibits the sale of all alcoholic beverages during the time the polls are open for voting in any state, county or municipal election, or during a longer period which may be designated by the governing body of a county or municipality. This statute contains a proviso whereby cities may increase the length of time, before and after the time the polls are open, during which alcoholic beverages may not be sold. But a city is not thereby authorized to lessen the hours of closing prescribed by the statute or to change the designation of the places which shall be closed.

The first statute mentioned above was enacted in 1935, and was amended as recently as 1947, but the second statute indicated above was enacted by the 1951 session of the Legislature and is therefore, its latest pronouncement concerning the hours during which alcoholic beverages may be sold.

In view of the above considerations it is my opinion that the question should be answered as follows:

(1) Section 104.381, being the latest expression of the will of the Legislature, should be considered an exception to the power granted by §562.14 (3) to incorporated cities and towns; and the effectiveness of any ordinances enacted under the authority of §562.14 (3) is suspended during those times that §104.381 is effective and applicable. The ordinance of the City of Apalachicola, described in question one, has no effect, therefore, during the time the polls are open for a state, county or municipal election, provided however, that the governing body of a county or city may extend the time during which §104.381 shall be effective in the manner described in the statute.

(2) Section 104.381, requires that no alcoholic beverages, (beverages containing more than one percent of alcohol by weight), shall be sold at retail during the time the polls are open for any state, county or municipal election. Places which sell such beverages under licenses issued by authority of §561.34 (1), (2), and (3) (places licensed to sell beer or wine, and packages stores) may remain open on an election day for the sale of things other than alcoholic beverages, but all places which sell alcoholic beverages under the authority of licenses allowed by the remaining subsections of §561.34, must close their doors for the time indicated. The governing bodies of cities and counties may extend the closing time required by §104.381 to the extent and in the manner indicated in said statute.

October 30, 1951—051-387.

THE ELECTION CODE—MISCELLANEOUS QUESTIONS

STATEMENT and QUESTIONS: (Note: In these questions and in the discussion of them herein, unless otherwise in-

licated, the section numbers refer to those set forth in Ch. 26870, Acts of 1951, "The Election Code of 1951".

(1) To what extent are local laws pertaining to registrations and elections affected by the Code?

(2) Under the provisions of §97.041 and Art. VI, §4, Florida Constitution, when a resident of Florida has been convicted of a felony in a United States District Court, is he disqualified as an elector until he has had his civil rights restored?

(3) In view of the provisions of §§101.62, 101.63 and 101.64, in relation to the application for an absent elector's ballot, when should such ballot be sent to the elector?

(4) Under the provisions of §101.47, is it necessary that the container into which identification slips are required to be deposited be actually "locked" as well as "sealed"?

(5) In a county which has adopted the permanent single registration system prescribed by §§98.041 to 98.151, both inclusive, when an elector who does not appear to be a freeholder returns the card required and contemplated by §98.081 and thereon indicates that he has become and is a freeholder, may the supervisor of registration enter on his registration record that he is a freeholder solely on the basis of information set forth on said card?

(6) Under §101.62, if it is proper to mail to an absent voter a ballot along with the application blank therefor, upon return of the application blank and the ballot, should the application blank be enclosed in the white envelope containing the ballot?

(7) May an elector by the use of one application blank for absent elector's ballot, obtain a ballot to vote in the first primary election and later a ballot to vote in the second primary election?

(8) In those counties which have not as yet adopted the permanent single registration system authorized by §§98.041 to 98.151, both inclusive, during what periods are the registration books required to be open in the several election precincts in the county?

(9) Should a supervisor of registration register a person as a member of the Communist Party?

To: Honorable Roland X. Droit, President, State Association of Supervisors of Registration, Sebring, Florida:

The above questions are answered as follows:

(1) The provisions of the Code are a bit confusing with respect to this question. Section 98.381 provides that all registration laws, after January 1, 1960, in conflict with the "Election Code of 1951" are repealed except Ch. 22195, Laws of 1943, creating the Hillsborough County Election Board. Section 104.44 provides that all local laws that conflict with the Code shall stand repealed after January 1, 1954.

If necessary, these provisions could be harmonized. It is to be noted, however, that prior to January 1, 1954, there will be another

regular session of the Florida Legislature, at which time these apparently conflicting provisions may be reconciled by proper amendment. It is sufficient now to state that at least until January 1, 1954, local laws, including local registration laws, remain effective.

(2) Section 97.041 relates to the qualifications of persons to register and also enumerates certain persons not entitled to vote. Among those persons not entitled to vote are those set forth in paragraphs 4. and 5. of the section as follows:

"4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.

"5. Persons convicted of bribery, perjury, larceny or any infamous crime in this or other states, or interested in any wager depending on the result of any election."

With respect to these disqualifications, attention is directed to §§4 and 5 of Art. VI, Florida Constitution.

Section 40.07, F. S., relating to jurors, provides that "no person who is under prosecution for any crime or who has been convicted of bribery, forgery, perjury or larceny, unless such person shall have been restored to civil rights, shall be qualified to be a juror." The question was raised in the case of *Duggar v. State* (Fla.) 43 So. 2d. 860, as to whether a person who had been convicted in the federal court of crimes against federal liquor laws amounting to felonies under federal statutes, had been convicted of a "felony" within the meaning of said §40.07. A majority of the court held in that case that the term felony as used in said statute was to be given the definition thereof as set forth in §25, Art. XVI, Florida Constitution; hence, that it pertained to conviction of a felony under the laws of the State of Florida. On the basis of that decision, it appears that one convicted of a felony in a United States District Court does not fall within the prohibition found in paragraph 4. of §97.041. The question now remains as to whether conviction in a United States District Court of a crime which under federal statutes is a felony constitutes an "infamous crime" within the meaning of paragraph 5. of §97.041.

The modern rule, adopted by the Supreme Court of the United States and by a majority of the state courts, holds that in determining if a crime is "infamous" the real criterion to be applied is whether the offense is one for which the statute authorizes the court to award an infamous punishment; i.e., imprisonment in a state prison or penitentiary (*Mackin v. U. S.*, 117 U. S. 348; *In re Claasen*, 140 U. S. 200; *U. S. v. Wells*, 186 F. 248; *Ann. 24 A. L. R.* 1002 et seq.; *Cases cited in 21 Words and Phrases*, 252 et seq.; 14 *Am. Jur.* 756 and *Cases cited in note 18 therein*; 22 *C. J. S.* 54).

The Supreme Court of Florida apparently has not ruled directly on this point. In *King v. State*, 17 Fla. 183 the court appears to have based its determination of what constitutes an infamous crime upon whether the crime was one which would disbar the person from serving as a witness or subject him to infamous punishment. In *Adams v. Eliot* (Fla.) 174 So. 731, the court said in effect that where the offense is not considered as a felony but as a misdemeanor only it will not be considered as infamous, requiring infamous punishment.

In the absence of a specific ruling on this question by our court, the better position would seem to be that the stated modern rule should be followed; that is to say, that a supervisor of registration shall assume the position that conviction of a person in a federal court of a crime constituting a felony under federal statutes is conviction of an infamous crime within the meaning of paragraph 5. of §97.041.

(3) Sections 101.63 and 101.64 reasonably would seem to contemplate that an absentee ballot is not to be sent to an applicant therefor until there has been filed with the supervisor of registration an application for such ballot meeting the requirements of §101.62. However, the following wording is found in the latter section: "The application blank shall be sent immediately, by mail, to the absent elector by the supervisor, together with the absentee ballot if they are ready for distribution or shall be delivered to the absent elector upon personal application at the supervisor's office."

Thus it would seem, in view of this quoted provision from §101.62 that if a ballot is available it shall be sent along with the application blank to the person requesting same.

(4) Section 101.47 is the revised version of what was formerly §100.34, F. S. The statute, as formerly worded, required that the "box, or can" to be used for the reception of electors' identification slips be "provided with a lock so that it may be securely locked." Present §101.47 refers to the "box or can" as a "container"; requires "each container to be securely sealed"; refers to the "seal" to be used with respect to such containers in several instances; and in one single instance refers to "the locked and sealed container." If the container for reception of identification slips is to be locked as well as sealed, that requirement must derive from such quoted part of said section.

It may have been the legislative intent in the revision of old §100.34 (now revised and amended §101.47) not to require that such containers be "locked" as well as "sealed". However, in view of the quoted words in the section, "the locked and sealed container", until the courts shall hold otherwise, the position is here taken that the containers must be locked and sealed.

(5) A person who registers under the permanent registration system prescribed by §§98.041 to 98.151, both inclusive, is required, among other things, to subscribe to an affidavit as to his freeholder status; i.e., whether or not he is a freeholder (§98.111). The freeholder status of an elector is of vital relevance to bond elections. In order to determine the number of freeholders entitled to vote in a bond election, such shall be determined by the supervisor of registration from the registration records of his office, which shall be accepted "as the determination prima facie of those entitled to vote in the election" (§100.241). Registration books shall close five days prior to the holding of a bond election (§100.231).

Attention is again directed to §98.111 and the method therein prescribed for evidencing the freeholder status of a registrant. If above quoted §100.251 is to be construed as applicable in connection with a registration not made in contemplation of an impending bond election, in any event the freeholder status of the registrant will be sworn to.

When a registrant, heretofore not appearing as a freeholder on the registration books, returns the card contemplated by §98.081 and indicates thereon that the registrant has become a freeholder, the supervisor of registration should not change the registrant's record to indicate that he is a freeholder in the absence of the registrant supporting such asserted freeholder status by affidavit. This requirement can be met by providing on the form of such card an appropriate affidavit to be executed by the registrant returning the card to the supervisor.

(6) In the answer to question (4) above, the position has been taken that when request is made for an application blank for an absentee ballot, if a ballot is available it shall be sent to the applicant with such application blank. If that is done and the absent elector returns both the executed application and the voted absentee ballot at the same time, the application should not be enclosed in the white envelope containing the voted ballot. As to the envelopes involved in absent voting, see §101.64.

(7) If an elector desires to vote in both first and second primary elections by absentee ballot, he must make separate applications for absentee ballots for each of such primary elections. Hence, this question is answered in the negative. See §101.62.

(8) Section 98.021, applicable in those counties which are not under the permanent registration system provided by §§98.041 to 98.151, both inclusive, and which are not under a permanent system set up by population or local act specifically providing times registration books are open in precincts, provides as follows:

"The registration books in each precinct may if necessary be opened at a convenient place on each week day from 9 o'clock A. M. to 12 M. and from 2 o'clock P. M. until 5 P. M. and one night each week until 9 P. M. during the month of January in even numbered years. Unless the board of county commissioners directs otherwise, the books must be kept open for not less than one day in each week throughout the period. Each precinct registration officer shall post notice in at least three public places within his precinct stating the building in which the registration books will be open." (Underscoring supplied).

This section is not at all clear. The following appears to be its intent: Registration books shall be open in the hands of "precinct registration officers" at least one day in each week during January of even numbered years, from 9 A. M. to 12 M. and from 2 P. M. until 9 P. M. If the county commissioners require the books to be kept open more than one day each week during such period, they shall be kept open the number of days in each week during such period required by said board. We have stated above the hours during which the books must be kept open during at least *one day* in each week. On other days which may be required, they shall be kept open from 9 A. M. to 12 M. and from 2 P. M. until 5 P. M.

(9) Generally, attention is directed to federal legislation relating to communist organizations in 50 U.S.C.A. 781, et seq. Subsection (15) of said section is quoted as follows:

"The Communist movement in the United States is

an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Under §876.05, F. S., no member of the Communist Party is eligible to be a candidate for or hold public office in this state.

Without laboring the point further, in view of the mentioned federal and state legislation, the Communist Party is not a political party within the purview of our election laws. Hence, should any applicant for registration be possessed of the temerity to request that the record designate him as a member of such party, the supervisor of registration should refuse to register him.

December 6, 1951—051-445.

NATIONAL CANDIDATES—NEWSPAPER ADVERTISEMENT—DONATION

QUESTION: There has been submitted to a Florida newspaper an advertisement signed by "Florida for Eisenhower, Incorporated", a nonprofit corporation, with request that same be inserted in said newspaper. It is assumed the proposed advertisement favors the nomination of General Eisenhower for the office of President of the United States.

In view of the provisions of §104.091, F.S., as revised and amended in Ch. 26870, Laws of 1951, may said newspaper legally accept such advertisement proffered to it for publication?

To: Honorable R. A. Gray, Secretary of State:

The effect of our opinion numbered 051-437, of November 30, 1951, addressed to Honorable J. Kenneth Ballinger, in part held that under §99.161, F.S., as included in Ch. 26870, citizens not connected directly or indirectly with a candidate could not publish their views by means of paid advertising in favor of a candidate, unless the provisions of Subsection 99.161 (7) were complied with. In view of

the manner in which presidential electors are nominated and elected, it may be that the conclusions reached in such opinion are not here applicable. (See §§103.011 to 103.031, F.S., both inclusive, as revised and amended in Ch. 26870). However, the answer below renders unnecessary any determination of that question now.

Attention is directed to §104.40, F.S.; as revised and amended in Ch. 26870, for penalties applicable upon conviction of the felony mentioned in §104.091.

Section 104.091 is the revised and amended version of the law formerly set forth in §§875.19, 875.20 and 875.21, F. S. The wording of these former sections of our statutes substantially followed the law as it was originally enacted as Ch. 4538, Acts of 1897. As originally adopted and as worded until its revision at the 1951 session of the legislature, it provided in part that, "No foreign or nonresident corporation or corporation organized under the laws of the United States, doing business in this state, nor any domestic corporation, shall pay or contribute, etc." It is to be observed that this wording has been changed to the extent set forth in above quoted §104.091.

It is recognized that elections are charged with public interest and in proper instances subject to police regulations by the state. The validity of any police regulation must derive from the necessity to serve public welfare. It is difficult to understand how any interest of public welfare is particularly subserved by visiting on nonprofit corporations, such as the one above described, the prohibitions set forth in §104.091. Nevertheless, the wording of this law from its beginning has been so broad that it cannot be said that nonprofit corporations are excluded. Until the courts shall hold in a proper proceeding that the law is not applicable to a nonprofit corporation, in view of the harshness of the penalties prescribed for its violation, ordinary caution dictates that it be construed to include such corporations.

The last paragraph of above §104.091 subjects persons who shall aid, abet or advise the violation of this law to the same penalty as prescribed in the law for a principal offender. It would seem that any officer, agent or other representative of a newspaper who accepts such an advertisement from a corporation, prohibited by the wording of this law to expend money therefor, would aid and abet such a corporation in the violation of the section.

Unless and until the courts shall hold that the provisions of §104.091 are not applicable to nonprofit corporations, the position is here assumed that such corporations are included in the wording and meaning of this section. Conceding such construction to be correct, it follows that the payment of the consideration required for the advertisement and the acceptance of the same as contemplated in the question, would result in violation of the statute by the officer, employee, agent, attorney or other representative so acting for the nonprofit corporation and by any officer, agent or other representative of the newspaper accepting such consideration, and the visiting upon the nonprofit corporation of the other penalties set forth in the statute.

CHAPTER X

OFFICES, OFFICERS AND PUBLIC RECORDS

PERSONS ELIGIBLE TO OFFICE; GROUP INSURANCE; EXPENSES

August 17, 1951—051-277.

TAX ASSESSOR, DIRECTOR CIVIL DEFENSE— AS DEPUTY SHERIFF

QUESTION: Can you as Tax Assessor of Flagler county and county director of civil defense, also serve as a deputy sheriff for the sole purpose of carrying out your civil defense duties?

To: *Honorable D. D. Moody, Tax Assessor, Flagler County, Bunnell, Florida:*

Section 15, Art. 16, Florida Constitution, provides in part as follows: "...and no person shall hold, or perform the functions of more than one office under the government of this State at the same time; provided, Notaries Public, militia officers, county school officers and Commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office."

The Supreme Court has held in *State v. Gendy*, 178 So. 166, that a deputy sheriff is not an independent officer notwithstanding the fact that he is required to subscribe to the same oath as the sheriff and to file a bond "conditioned for the faithful performance of the duties of his office."

It appears therefore, that a deputy sheriff does not occupy an office under the government of the state within the meaning of the constitutional provision cited.

There also remains the question as to whether or not the duties of a tax assessor and those of a deputy sheriff are incompatible to such an extent that an individual holding both positions might create a situation which would be against public policy. In my opinion, such is not the case, particularly in view of the fact that your question is predicated upon the assumption that you would exercise your authority as deputy sheriff only when necessary in carrying out your duties as county defense director.

The civil defense act contemplates the possibility of emergencies arising which would be so hazardous to the public welfare that extraordinary measures and precautions must be established which are capable of dealing with such emergencies. Police protection is a vitally important factor in the procedures provided under the act and in time of emergency or in a period of preparation for an emergency which might be reasonably anticipated, I believe that it was the intention of the Legislature to remove or restrict many of the technical obstacles which under ordinary circumstances and in normal times might prevent a public official from undertaking the responsibility and duties contemplated in your inquiry.

In view of these circumstances, it is my opinion that if you find it necessary to assume the authority of a deputy sheriff in properly discharging your responsibility as a county civil defense director, there is no legal prohibition against such an appointment at the discretion of the sheriff, even though you are simultaneously occupying the office of tax assessor. This opinion is based on the assumption that you would exercise your authority as a deputy sheriff only in connection with your responsibility as a civil defense director and in coping with such emergencies which may arise which would necessitate your being vested with the powers of arrest.

LEAVES OF ABSENCE TO OFFICIALS

March 26, 1951—051-64.

GOVERNOR'S AUTHORITY—LEAVES OF ABSENCE TO OFFICIALS

QUESTION: Does the Governor have authority to grant a leave of absence to a county commissioner for the purpose of permitting such commissioner to accept employment on an air base project in North Africa for a period of several months?

To: Honorable Fuller Warren, Governor of Florida:

The proposed employment on an air base project in North Africa could not be considered as "active military service" under Ch. 115, F.S., since it does not meet the definition of such service as set forth in §115.08. An examination of the statutes and decisions reveals no other authority under which such a leave of absence could be granted. Hence, it is my opinion that your question must be answered in the negative.

April 26, 1951—051-94.

STATE OFFICERS AND EMPLOYEES — RETIREMENT STATUS—LEAVES OF ABSENCE—MILITARY SERVICE

QUESTIONS: Assuming that an employee of the Military Department of the State of Florida has been granted leave of absence for military service under the provisions of Ch. 115 F. S.

(a) Is there any limitation of time in which the employee must be relieved from active duty and return to his former position in order that he retain his legal right to reemployment in such position?

(b) Is there any limitation of time in which the employee must be relieved from active duty and return to his former position or another position as an employee of the State, in order that he may continue to receive retirement credits under the provisions of the State Employee's Retirement Act for the time spent in active federal military service?

To: Major General Mark W. Lance, Adjutant General, Military Department, St. Augustine, Florida:

The answer to question (a) is governed by the provisions of §§115.06, 115.08, 115.14, and 115.15 F. S.

The pertinent provisions of §8, Ch. 720, Acts of Congress, approved September 19, 1940 are:

"(b) In the case of any such person who, in order to perform such training and service, has left or, leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(c) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay. As amended Dec. 8, 1944, c. 548, §1, 58 Stat. 798; June 29, 1946, c. 522, §1, 60 Stat. 341."

The benefits of the Act are available to any state employee who has obtained leave of absence for military duty for the period of time intervening between the date of his entering military service and ending at his death, or upon a date thirty days following the date of his release or discharge from the service, or upon his return from service, whichever shall occur first.

What has been presented in answer to question (a) is equally applicable to question (b), in so far as the time of service of an officer or employee is concerned. The right of an officer or employee to participate in the benefits of the State Officers and Employees Retirement System under the stated conditions, is further regulated by the statutory provisions dealing with the particular subject.

Chapter 121 F.S. is the governing law with respect to the rights of officers and employees to enjoy the benefits of the Retirement System.

Applying §§112.02 (4) and 115.12 to the question presented, the answer to question (B) is:

Any officer or employee of the State, who is granted leave of absence for military duty is entitled to full credit in the computation of aggregate number of years of service to the State, to the time spent in military service, in fixing the amount of retirement compensation to which he is entitled upon retirement, and is relieved of the requirement for making contribution to the retirement fund during his period of military service.

August 15, 1951—051-273 050-478.

FIC EMPLOYEES—MILITARY LEAVES OF ABSENCE

QUESTIONS: (1) What are the circumstances which determine whether §115.07 or §115.09, F.S., relating to military leaves of absence of public officers and employees, apply to a given case?

(2) Of the criteria which might be included in the answer to question (1), (a) type of duty to be performed, and (b) duration

of the military leave, can be anticipated. Of these two, which should be given the most consideration when determining under which of said sections leave should be paid?

(3) With respect to the leave authorized by §115.07, would this 17-day period consist only of actual working days or would the same include all calendar days falling within the calendar period?

(4) With respect to the leave authorized by §115.09, would this 30-day period consist only of actual working days or would the same include all calendar days falling within the calendar period?

(5) Does the phrase in §115.07, "one annual period" mean calendar year, fiscal year, or such 12-month period as the agency may select?

(6) Where an employee has already received the 17 days of military leave provided in §115.07 and then within the same annual period is called to active duty for an indefinite future term, is he entitled to receive in addition the full 30 days' military leave provided by §115.09, or merely the difference between the 17 days he has already had and the 30 days to which otherwise he is or would be eligible under said last-named section?

To: Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:

Section 115.07 was amended by Ch. 26852, Laws of 1951. The effect of the amendments was to make it applicable to "reserve enlisted personnel" as well as commissioned reserve officers, and to add "members of the national guard" to the other personnel in the United States military or naval service described in the amended section. Otherwise, this section was left unchanged.

No mention was made in this request for opinion concerning leaves of absence under §250.48, F. S. This provision of law should also be considered. It is here to be noted that the amendment of §115.07 by including therein "or members of the national guard" did not modify or affect in any way the provisions of §250.48.

On October 6, 1950, opinion 050-478 of this office (A.G.R. 1949-1950, page 158) was issued to the Chairman of the State Road Department concerning military leaves of absence, particularly under §§115.09, 115.14 and 250.48, F. S. The opinion also dealt with the provisions of §115.07. To avoid needless repetition, reference is made to such former opinion, copy of which is attached.

(1) The question of which of these statutes, relating to military leave of absence, applies to any given case depends upon the type of military service involved.

Section 115.07: There is here contemplated regular annual military training for reserve officers and enlisted men in the military or naval service or members of the national guard in conformity with the orders of the United States military or naval training regulations. While we are not definitely informed, it is a matter of common understanding, subject to possible exception, that such annual training periods are of two weeks' duration. An employee of the Commission called to active military duty for the purpose mentioned is granted by this section leave of absence "without loss

of pay, time or efficiency rating" not "to exceed seventeen days in any one annual period." Such leave of absence is granted as a matter of law.

Sections 115.09 and 115.14: There is here contemplated active military duty described in this section, not confined to duty for training purposes as described in the preceding paragraph, and usually for a period of indefinite and uncertain duration. Employees of the Commission may be granted, in the discretion of the Commission, military leave of absence in connection with such active military duty. If the leave is granted, the "first thirty days . . . to be with full pay and the remainder without pay." Orally, the above general counsel for the Commission has related a specific case wherein an employee of the Commission has been called into active military duty within the contemplation of §115.08, F. S., for a period of sixty days, not for training purposes but to perform a definite function in the branch of the service into which he has been called. Such active military duty falls within the purview of §115.09.

Section 250.48: Attention is directed to the type of state service in the national guard within the meaning of this section as explained in opinion 050-478. As mentioned, one of the amendments to §115.07 involved the addition of the words "or members of the national guard" to the military personnel covered by said section. It is to be particularly noted that the national guard activity under §115.07 is in pursuance of "provisions of the United States military or naval training regulations." The only other apparent instance when the Florida National Guard might be called into service for training or field exercises would be under §250.49, which provides for an annual encampment, upon the order of the Governor, subject to the restrictions of the national defense act. With that in mind, we repeat from opinion 050-478 that the "state" service covered by §250.48 consists of those instances when "the Florida National Guard may be called to active duty, such as when ordered into service to suppress riots or otherwise aid in emergencies, or for annual encampment purposes." An employee of the Commission, a member of the Florida National Guard, called into "state" service, as contemplated by §250.48, as thus explained, is legally entitled to a leave of absence for such purpose "without loss of pay, time or efficiency rating" while on such active state duty, provided such leave of absence without loss of pay "shall not exceed seventeen days at any one time."

(2) This question appears to be adequately answered by the remarks set forth in the answer to Question (1).

(3) The seventeen days' leave of absence granted by §§115.07 and 250.48 are calendar days and not work-days. This apparently was the legislative intent for this reason: in each of such sections, the 17-day leave is mandatorially granted without loss of *pay, time or efficiency* rating. Time of service with the state is computed generally on a calendar month basis, not on a work-day basis; thus, leave without loss of *time* would appear necessarily to mean time in State service, which includes Sundays and other holidays in any given period. If the 17-day leave is figured on a work-day basis, there results a time of service with the State inconsistent with the recognized custom and rule as to computing such service.

(4) Without further comment, this question is answered by stating that the 30-day period under §115.09 consists of the calendar days in such period and not work-days.

(5) To insure uniformity of application, it must have been the legislative intent that the phrase "one annual period," as used in §115.07 had reference to one calendar year, and is so construed.

(6) An employee of the Commission who has received the 17-day military leave granted by §115.07 is eligible for the full 30-day leave permitted by §115.09 in any "one annual period." It is well to remark here that the 17-day leaves granted by §250.48 are not restricted to annual periods. So it is that such an employee of the Commission is entitled in any one annual period as a matter of law to the 17-day leave granted by §115.07, to one or more 17-day leaves under §250.48, and in addition thereto is eligible for the 30-day leave under §115.09. This is in accord with the reasoning employed in opinion 050-478.

POWERS AND DUTIES OF OFFICERS

March 26, 1951—051-62.

COUNTY COMMISSIONERS—HIRING RELATIVE AS PROSECUTING ATTORNEY

QUESTION: Please advise me whether it is unlawful for an attorney to be employed as county prosecuting attorney by the board of county commissioners when one or more of the commissioners are related to said attorney within the fourth degree and the commissioner is also employing for the board another near relative?

To: *Honorable Wilson L. Bailey, Attorney at Law, Blountstown, Florida:*

Section 116.10 F. S., would appear to be applicable in the situation you describe. Your question is therefore answered in the affirmative.

NOTARIES PUBLIC

June 29, 1951—051-185.

ALIEN—ELIGIBILITY

QUESTION: Is an alien eligible to hold the office of Notary Public in this State?

To: *Honorable Fuller Warren, Governor of Florida:*

This question has been considered in two prior opinions rendered by my predecessor in office, copies of which are attached (see 1943-44 Biennial Report, page 172, No. 043-337; 1947-48 Biennial Report, page 627, No. 047-80). These opinions hold that a citizen of a foreign country is not eligible for appointment to the office of notary public, and an examination of the authorities cited therein leads me to the conclusion that I must concur in such rulings.

PUBLIC RECORDS

April 6, 1951—051-81.

PROFESSIONS—EXAMINATION GRADES—PUBLIC INSPECTION

QUESTION: Do the various Boards and Commissions have a right under the law to withhold grades made by respective applicants for admission to practice the said profession, for example, the State Board of Pharmacy, State Board of Law Examiners, State Board of Veterinary Examiners, etc.?

To: *Honorable C. L. Clark, Executive Assistant to Governor Fuller Warren:*

In order to properly answer the above question, it is first necessary to determine whether or not examination grades on examinations given by the various boards and agencies in this state for the purpose of determining the qualifications of an applicant to practice his profession are public records. It is my opinion that any and all records relative and pertinent to the official conduct of state business by all state agencies and boards are, unquestionably official records of those boards and agencies. It is also my opinion that all records of state boards and agencies are state records.

The grades made by an applicant to determine his qualifications to practice a profession in this state are certainly pertinent to the conduct of official business of the various boards and agencies regulating the rights of individuals to practice their respective professions and, therefore, are state records.

It now becomes necessary to determine to what extent state records are open for personal inspection by citizens of the State of Florida. Section 119.01, F. S., reads as follows:

"All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

This statute merely gives recognition to one of the basic principles of our form of government, i.e., that the public records, documents and, for that matter, public officials, are for the use of the people. The state boards and agencies are merely servants of the people of this state and the records and documents of these boards are kept by the officers in the capacity as agents for the people. The people themselves are the only safe depositories for our public records.

It would do violence indeed to our very system of government to hold that a person had no right to inspect the examination grades which are under the immediate control of a board or agency of this state. To rule thusly would be to allow any board or agency to arbitrarily deny a person the right to practice a profession in this state and assign as a reason for such a denial that the said person's grades on the examination did not meet the required standard. In such a case, if the person had no right to inspect and compare his examination grades and the examination grades of others taking the same exam-

ination at the same time, then the public has been denied one of the primary functions which they have delegated to the boards and agencies of this state.

Since the purpose of the various boards and agencies is to conduct their business as agents for the people, public policy must of necessity be a prime consideration in each case where state records or documents are to be inspected. See *Lee v. Beach Publishing Company*, 127 Fla. 600, 173 So. 440. It therefore follows that in determining which records may be inspected, the time of inspection, the method of inspection and the persons who may inspect, the officers of the respective boards and agencies are charged with exercising a reasonable discretion in order to protect the general public.

The extent to which a board may refuse a person the right to inspect certain records must depend on the facts of each particular case and all possible contingencies cannot be anticipated in this opinion. As an example of the aforementioned discretionary powers, we quote as follows from Attorney General Opinion 050-510:

"Specifically, examination questions themselves should not be open to general public inspection since disclosure of the content of the questions to applicants in advance of examinations would defeat the very purpose of such examinations. This restriction is imposed by the federal authorities administering the state Merit System services, and is especially applicable to those questions supplied by the federal agency for the use by all states at various times. However, it is generally recognized that a candidate should be entitled to see his own test papers under carefully controlled conditions. Moreover, in order to determine that there was no fraud or irregularity in the grading or other processing of the examinations, it is my opinion that test papers may be examined by others who can show such reasonable basis for desiring to inspect them. This might well include newspaper reporters, members of legislative committees, or other candidates competing in the same test, who, because of their personal interest or in behalf of the public generally, are entitled to be assured that the tests were administered fairly, impartially, and without favoritism or irregularity."

It is my opinion that examination grades on examinations held by the various boards and agencies of this state to determine the qualifications of a person to practice his profession are state records and may be inspected so long as the demands of public policy are adequately protected.

January 31, 1952—052-28.

CLERKS CIRCUIT COURT—RECORD BOOK—PUBLIC INSPECTION

QUESTION: Is the book in which the Clerk of the Circuit Court keeps a record of the amounts received and paid out from the registry of the Court a public record open to the inspection of any citizen?

To: *Honorable Henry C. Tillman, Circuit Judge, Tampa, Hillsborough County, Florida:*

I assume your inquiry relates to that record kept by the Clerk

of the Circuit Court pursuant to §54.04, F. S., which provides for the disposition of moneys paid into any court in this state. Although said section does not specifically prescribe that a formal record book shall be kept, it is obvious that some such record is required to be maintained by the Clerk to show the receipt and disposition of moneys paid into or out of this registry.

Section 119.01, F. S., provides as follows:

"Public records open to examination by citizens.—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

This statute's import is clear. It makes it mandatory that all state, county and municipal records shall be open to the public's inspection, and any denial of such right of access is expressly forbidden. Undoubtedly, by "a state, county or municipal record," the statute means what is ordinarily termed a "public record," which has been defined by a series of cases, both in this state and elsewhere, as "a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done." *Amos v. Gunn*, 84 Fla. 285, 94 So. 615; *Robison v. Fishback* (Ind.), 93 N.E. 666; 45 Am. Jur. 420.

Applying this definition to the specific case raised in your letter, it seems clear that the court registry record book is a written memorial made by a public officer who is authorized to make such a record, and that such record is necessary to be kept in the discharge of a duty imposed by law, and serves as a memorial and evidence of something done. Accordingly, it is my opinion that the book kept by the Clerk of the Circuit Court showing amounts received and paid out from the registry of the court is a public record and therefore open to inspection by any citizen of this state. This answers your question in the affirmative.

STATE OR COUNTY, OFFICERS AND EMPLOYEES RETIREMENT SYSTEMS

May 27, 1952—052-165.

RETIREMENT STATUS—CROSS STATE SHIP CANAL AUTHORITY—PORT AUTHORITIES AND DRAINAGE DISTRICTS

QUESTIONS: 1. Are the officers and employees of "The Ship Canal Authority of the State of Florida," established under and by Ch. 16176, Laws of 1933, within either the "State Officers and Employees Retirement System," or the "County Officers and Employees Retirement System?"

And as we have a similar request, from the Chairman of the Florida Industrial Commission, requesting our opinion upon the same question and the following additional questions, we shall attempt to answer them in this opinion also,

2. Are the officers and employees of "The Florida Ship Canal Navigation District," established under and by

Ch. 17023, Laws of 1935, within either of the said retirement systems?

3. Are the officers and employees of port authorities within either of the said retirement systems?

4. Are the officers and employees of drainage and similar districts within either of the said retirement systems?

To: Honorable C. M. Gay, State Comptroller:

"The Ship Canal Authority of the State of Florida," was created by the 1933 act as a body corporate with its principal office at Tallahassee, Florida, and branch offices "at such other places and under such rules and regulations as the board of directors may prescribe." The capital of the corporation consisted of rights, privileges and franchises granted by the legislature and determined by it "to be of the value of Twenty Million Dollars." The corporate powers of the authority are broad and inclusive. The directors of the corporation are appointed by the Governor of Florida for terms of four years each. The corporation is given the state's power of eminent domain. It may use state lands for corporate purposes. The corporation is given jurisdiction over the operation of the canal, the fixing of tolls, may employ canal pilots, is tax exempt under §16, Art. XVI, of the state constitution, and has the power of contract.

"The Florida Ship Canal Navigation District," was created by Ch. 17023, Laws of 1935, "for the purpose of raising funds to be used by The Ship Canal Authority of the State of Florida" in the execution of its powers and duties. The board of directors of the ship canal authority are ex officio the board of commissioners of the navigation district. The district is authorized to establish offices "either in Tallahassee, Florida, or in some city within the district." The powers and authority of the district are also very broad and inclusive. The district is authorized to levy taxes upon the real and personal property within the district, which taxes are assessed upon the tax rolls of the counties within the district and collected by the tax collector along with county taxes. These taxes are assessed and collected in the same manner as are county taxes. These taxes are assessed on an ad valorem basis.

The request for opinion as to "Port Authorities" makes here special reference to the Broward County Port Authority, which was created, evidently as the governing board of the Broward County Port District, by Ch. 17506, Laws of 1935. The said port authority has the usual powers of a port authority and act as the commissioners for the port district. The port authority is given power to levy, assess and collect an ad valorem tax on the taxable property within the port district for district purposes and uses. These taxes are assessed upon the county tax roll and collected in the same manner as are county taxes. The said request also makes special reference to the Hillsborough County Port Authority, created by Ch. 23336, Laws of 1945, which is, from a legal standpoint, similar to the Broward County authority and district. Reference is also made to the officers and employees of the North St. Lucie River Drainage District, which appears to have been created under

the general drainage laws of this state (see Ch. 298, F. S.) and later validated by Ch. 7973, Laws of 1919. Legally there is little distinction between the said port district and authorities and the drainage district and its governing authorities.

One thing seems noticeable between the cross-state canal district and authority and the local port authorities and districts; the former appears to be of statewide interest while the latter were evidently intended to serve a local purpose. They each seem to be in the nature of "public corporations," (see 35 Words and Phrases, 75 et seq.) Counties and county boards (35 words and Phrases 77), drainage districts (35 Words and Phrases 77), improvement districts and irrigation districts (35 Words and Phrases 78 and 79), levee districts (35 Words and Phrases 81), reclamation districts (35 Words and Phrases 85), school districts (35 Words and Phrases 85), toll bridge authorities (35 Words and Phrases 86), water districts (35 Words and Phrases 87) and other similar type districts have been held to be public corporations. In *Forbes Pioneer Boat Line v. Board of Commissioners of the Everglades Drainage District*, 77 Fla. 742, 82 So. 346, the court remarked that "it seems to us that the board of commissioners of the Everglades drainage district is in no sense a private corporation, but that it is a public quasi corporation, and, as such, a governmental agency of the state for certain definite purposes."

It has been held that municipal corporations (*Loeb v. City of Jacksonville*, 101 Fla. 429, 134 So. 205, text 207 and 208), irrigation districts (*Logan Irrigation District v. Holt*, 110 Colo. 253, 133 P. 2d. 530), Reclamation districts (*Sutter-Yuba Investment Company v. Waste*, 52 Cal. App. 2d. 785, 127 P. 2d. 25, text 27), county boards of public instruction (*Roberts v. Board of Public Instruction*, CCA Fla., 112 Fed. 2d. 459, text 461), power dam authorities (*State v. Grand River Dam Authority*, 195 Okl. 8, 154 P. 2d. 946, text 950), Board of Commissioners of the Port of New Orleans (*Miller v. Commissioners Port of New Orleans*, 199 La. 1071, 7 So. 2d. 355, text 356) and other public corporations are in the nature of agencies of the state; however, they do not seem to be arms of the state. Drainage districts, municipalities and county school boards, although broadly speaking are agents of the state, they are such agents only to a limited extent, probably depending largely upon the extent of their duties. Usually the duties, authority, power and jurisdiction of municipalities, drainage districts, port districts, and similar in this state are limited to localities embracing only a portion of the state.

The powers, duties, authority and jurisdiction of the cross state ship canal district and authority are much broader than that of the above mentioned port authorities and drainage district. As a matter of fact it appears that the legislature (by establishing the office of these agencies in Tallahassee, Florida,) probably intended that these agencies be statewide in their benefits, although the district was limited to a few counties. Although drainage districts established under the general drainage statutes, and most if not all port districts, may be state agencies in the broad sense, their services are rendered primarily to the county or counties wherein the said districts are located; the reverse seems to be true with state agencies like the cross state canal.

Examining §§121.02 and 134.02, F.S., we find definitions of "state officers and employees" and of county "officers and employees," each depending largely upon the source of the funds used for paying their compensation. County officers and employees include those officers and employees "who receive compensation for services rendered from county funds." Also included are those persons employed by "any agency, branch, department, institution or board of any county, whether paid from county funds or not. A comparison of the 1945 acts and their 1947 amendments show an intention, by the 1947 amendment, to extend their subject matter from state and county employees in the strict sense to such employees in a broad sense. It appears that the state comptroller has, in connection with the enforcement of the county act, ruled that where drainage districts are set up so that their officers and employees are paid from ad valorem taxes assessed, on the county tax roll, and collected by county taxing officials, that they, if otherwise qualified, come within the purview of that act. Such has been his ruling when the district spreads over several counties. Local port authorities under like circumstances have also been held to be within the county act. We feel that the departmental ruling of the state comptroller is entitled to grant weight and think that it, not being clearly in error, should be followed by us.

Due to the fact that the legislature appears to have considered the cross state canal district and authority as being of statewide importance (with offices in Tallahassee, Florida) we feel that they come within the state retirement system instead of the county system.

CHAPTER XI

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS

COMMISSIONERS' DISTRICTS

August 2, 1951—051-253.

COUNTY COMMISSIONER'S DISTRICTS—REDISTRICTING

QUESTIONS: 1. Is it mandatory that the board of county commissioners of Brevard County redefine the commissioners' districts of the county, although it will abolish an existing district, and in addition abolish the office created by Ch. 19716, Laws of 1939, where such county commissioner is designated a member of the governing authority of the Canaveral Port District?

2. In fixing the boundaries of the 5 county commissioners' districts pursuant to Art. VIII, §5, Florida Constitution, should the board abolish into existing districts and proceed to fix the boundaries of 5 new districts "as nearly as possible equal in proportion to population", or should the boundaries of existing districts be contracted or expanded, as the case may be, thereby fixing the boundaries "as nearly as possible equal in proportion to population?"

To: Honorable Noah B. Butt, Attorney, Board of County Commissioners, Brevard County, Cocoa, Florida:

The pertinent portion of Art. VIII, §5 of the Florida Constitution reads:

"Section 5. There shall be one county commissioner in each of the five county commissioners' districts in each county, which districts shall be numbered one to five inclusive, and shall be as nearly as possible equal in proportion to population. The board of county commissioners in the respective counties shall from time to time fix the boundaries of such districts. * * *"

(Underscoring supplied)

1. Your letter indicates that there has been a shift in population within the county since the districts were last fixed. The Court in *Prince, et al vs. State ex rel Williams*, 157 Fla. 103, 25 So. 2d. 5, said that while the board may exercise "reasonable discretion" it must not disregard the "mandate of the Constitution requiring that such districts must be created with a view to equality in population." This view was followed in *Belcher, et al vs. State of Florida ex rel Frank J. McMulty*, 159 Fla. 624, 32 So. 2d. 282. If the present districts do not meet the "population test" then the duty is cast upon the board to re-district to the end that "the population of each district shall be equal to that of the others as near as it is practicable * * *"

(*Prince, et al vs. State ex rel Williams, supra*).

Where it becomes necessary to abolish a county commissioner's district in order to conform with Art. VIII, §5, of the Constitution, and the commissioner was designated by Ch. 19716, Laws of 1939,

a member of the Canaveral Port Authority, the earlier legislative enactment is superseded by the later expression. We understand that although a vacancy is created, the functions of the Authority are not jeopardized since there remains 6 of the 7 members. The question is answered in the affirmative.

2. I find no requirement that one or the other method of fixing districts, should be followed. The Board may thus expand or contract the boundaries of present districts and thereby avoid complications and confusion; provided in so doing, the requirements of the Constitution are met. However, density or lack of population in given areas within the county may not permit that procedure in order to comply with Art. VIII, §5. Subject to the constitutional mandate, the mechanics of re-districting must be formulated by the county commissioners.

August 9, 1951—051-265.

COUNTY COMMISSIONERS—RESIDENCE—REDISTRICTING COUNTIES

QUESTION: Where during the term of a duly elected county commissioner, the boundaries of his commissioners district were so changed and redefined that he no longer resides within the district from which elected, does his said office become vacant under the provisions of §114.01, F.S.?

To: *Honorable Cecil L. Anchors, Clerk Circuit Court, Crestview, Florida:*

Section 114.01, F.S., provides in part that "every office shall be deemed vacant in the following cases . . . by his (the incumbent) ceasing to be an inhabitant of the . . . district . . . for which he shall have been elected or appointed." Under the constitution, county commissioners are county officers and not district officers; they are elected "by the qualified electors of said county" and not by the electors of the district alone, and their duties are county-wide and not merely for the district within which they may reside. Under the constitution there is "one county commissioner in each of the five county commissioner's districts in each county." (§5, Art. VIII, State Constitution.) Under the said constitutional provision the boards of county commissioners are required "from time to time (to) fix the boundaries of such districts." There is nothing in the state constitution declaring the office of county commissioner vacant under the circumstances set out in the above question. Under the constitution the terms of office of the county commissioners are fixed at four years (§5, Art. VIII, State Constitution.) The duty of the county commissioners to redistrict their county, pursuant to the requirement of the constitution, *from time to time* as the population increases is mandatory (*Price v. State*, 157 Fla. 103, 25 So. 2d 5; *Belcher v. State*, 159 Fla. 624, 32 So. 2d 282).

In construing §114.01, F.S., it should be so construed as to harmonize with the constitutional provision fixing the term of office of county commissioners at four years. "The change in the districts, then, can only take effect, *in so far as the election of county commissioners is concerned*, at the expiration of" his term of office as fixed by the state constitution (see *Brungardt v. Leiker*, 42 Kan.

206, 21 P. 1065, text 1067). "In our opinion, an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of commissioners, and in no way affects the right to the office of those previously elected." (State v. Holden, 45 Minn. 313, 47 S. W. 971.) In this connection see also State v. Haverly, Neb., 87 N. W. 959 and State v. Milwaukee County, 21 Wis. 443. The office of county commissioner is a constitutional office and the incumbent of such office is a constitutional officer, whose office cannot be abolished by either the Legislature or by other county commissioners redistricting the county. (See Conyers v. State, 98 Fla. 417, 123 So. 817, relating to a justice of the peace).

In the light of the above authorities and observations we think that the county commissioner in question may serve out the term for which elected notwithstanding the redistricting of the county, and that the above question should be answered in the negative.

COUNTY COMMISSIONERS—POWERS, DUTIES AND COMPENSATION

January 11, 1951—051-8.

COUNTY TAX ASSESSOR—ATTORNEY'S FEE

QUESTION: Does a board of county commissioners have authority to pay for attorney's services in defending a tax assessor in a suit where the revenue of the county is directly affected by said suit and the county attorney is disqualified to represent the tax assessor?

To: Honorable E. G. Chowning, Chairman, Board of County Commissioners, Dixie County, Cross City, Florida:

I have been given to understand that the correct facts in the specific instance you have in mind are as follows:

Shamrock Properties filed an unsworn return with the Tax Assessor of Dixie County, Florida, which return did not show an electrical power plant and distribution system and the Tax Assessor refused to accept the return and assessed Shamrock Properties' property at approximately \$10,000 more than the unsworn return.

Shamrock Properties' agent appeared before the Board of County Commissioners sitting as a Board of Equalization and requested that the assessed value be lowered.

Without taking any sworn testimony and without any sworn statement as to the property being protested, the County Commissioners granted the reduction in valuation.

The Tax Assessor was convinced that the County Commissioners had not acted according to law and refused to extend taxes based on the valuation as reduced by the Board of County Commissioners but proceeded to extend taxes based on the valuation which he had originally placed on the property.

Shamrock Properties brought mandamus against the Tax Assessor to compel him to reduce the valuation as ordered by the Board of County Commissioners. Alternative writ was issued, mo-

tion to quash was denied, answer was filed and on motion was stricken as setting up no defense and judgment entered against the Assessor.

The Assessor appealed and the Supreme Court reversed the lower court and held that the Assessor was correct in his position because the County Commissioners do not have authority to reduce valuation on personal property unless the protest is sworn to or supported by sworn testimony and since this was not done, the order of the County Commissioners was void.

The Tax Assessor was represented in those proceedings by an attorney employed by him to represent him in the action.

The fees of the Tax Assessor of Dixie County are not sufficient to pay him the maximum salary allowed by law.

The Board of County Commissioners has agreed to pay the attorney who represented the Tax Assessor if it is lawful to do so, the County Attorney of Dixie County having been disqualified to represent the Tax Assessor because of his advice to the Board of County Commissioners relative to their authority to reduce valuation of Shamrock Properties' property.

The circumstances in this case are somewhat unusual. Under ordinary circumstances I assume that the regular attorney for the Board of County Commissioners would have defended the Tax Assessor in the suit brought against him but in this instance he was disqualified from doing so since the Board of County Commissioners took an adverse position to that of the Tax Assessor.

I do not believe that there would be any real issue as to the authority of the Tax Assessor to pay an attorney's fee out of excess fees which had accrued in his office.

In an opinion of one of my predecessors in office contained in the Biennial Report of the Attorney General for 1929-30 on pages 316-17 the Hon. Fred H. Davis made the following statement:

"It has also been the practical departmental construction of all the statutes which have been passed limiting the fees of officers which might be retained by them for their own use, to recognize attorney's fees as being a proper and legitimate expense to be paid out of such fees. This practical construction has obtained ever since the first fee statute was passed in 1921. It has been recognized by the administrative department, the auditing department and other supervising departments of the State Government having jurisdiction over county officers, as well as by the county commissioners themselves, who have never made any legal objection to it."

I concur in this view and do not believe that the fact that the Tax Assessor in question had no excess fees at his disposal with which to employ counsel should necessarily alter his right to employ an attorney if necessary to the proper performance of his duties. In so far as the fundamental issues involved are concerned, I can see no distinction between paying an attorney's fee directly out of excess

fees of a county office before they are paid into the general county funds or after such transfer.

It appears to be well established that a Board of County Commissioners may expend county funds in securing necessary legal services for the benefit of the county.

In *State vs. Culbreath*, (Fla.) 174 So. 422, the court made the following observation:

"The prosecution and defense of legal causes must necessarily, under the system of jurisprudence obtaining in this country, be done by legal representatives in the courts provided by law for the adjudication of controversies. The power carries with it the necessary implication, therefore, that counsel may be employed by the boards of county commissioners whenever in the judgment of such boards the interest of the counties require the services of counsel in the courts, whether state or federal, within whose jurisdiction the controversies in which the counties are interested may lie."

The facts involved in this case as outlined above indicate that the action of the Tax Assessor in securing an attorney to represent him was not only necessary to protect the interests of the county but resulted in a benefit to the county, since the Tax Assessor prevailed in the position he assumed and taxes were collected for the county which otherwise would not have been collected.

I think, therefore, that in the final analysis your question may best be answered as follows:

There is no legal prohibition against the payment of an attorney's fee under the particular circumstances involved, if in the opinion and discretion of the Board of County Commissioners such employment served a county purpose and resulted in a benefit to the county.

Subject to the above remarks, your question is answered in the affirmative.

February 28, 1951—051-41.

PURCHASES—FIRE FIGHTING EQUIPMENT—BIDS

QUESTION: May a board of county commissioners purchase fire fighting equipment to cost approximately \$2700 without advertising for competitive bids when the equipment is to be used jointly with a municipality and operated by said municipality?

To: *Mr. F. A. Parker, Clerk, Board of County Commissioners, Taylor County, Perry, Florida:*

I assume that the equipment is to be used for a county purpose, otherwise the county would have no authority to purchase it. This being the case, I believe \$125.08 would be applicable and your question must therefore be answered in the negative.

February 21, 1952—052-50.

PURCHASES—ROCK FROM CLERK CIRCUIT COURT BIDS

QUESTION: The county does its own road work with a crew

and machinery. The rock material used has been taken from various rock pits in each district and purchased from the owner at approximately 25 cents per load. The best supply of rock that is accessible now belongs to the Clerk of the Circuit Court. The Board could probably find other rock pits in the county, but a new rock pit would have to be opened at considerable expense, and the hauling cost would be greater because of distance to the projects. The clerk is willing to sell the rock at the same price as has been paid other owners in the county. The amount of rock used from time to time is not estimated by the Board and put up for bids but is purchased as it is needed. If the Board purchased the lime rock from the Clerk of the Circuit Court, would such violate §§839.07, 839.08 or 839.09, F.S.?

To: Honorable William O. Clifton, Attorney, Board of County Commissioners, Gilchrist County, Trenton, Florida:

Sections 839.07, 839.08 and 839.09, F.S., contain various provisions intended to prohibit public officers or members of public boards from taking advantage of their official position to sell supplies to the agency which they control. From the factual situation which you have described, it would not appear that the clerk of the circuit court would have any direct control over the Board of County Commissioners in making purchases of rock or other road building materials. The clerk is not a member of the board and has no official voice in the deliberations of said Board.

Acting in his capacity, however, as clerk, it might well be that he would have considerable indirect influence upon the Board. Taking this fact into consideration, it would appear that any purchases made by the Board from its clerk might be subject to criticism on the basis that it was against public policy. As I stated in an opinion issued on August 9, 1950 (No. 050-388), such statutes as those cited above and §125.08 which requires the calling for bids, have for their purpose the securing of economy, protecting the public from collusive contracts, and preventing favoritism, fraud, extravagance and imprudence in the expenditure of public moneys. As a result they are generally considered mandatory in application and require strict compliance with their terms. Our Supreme Court firmly established this general principle in the cases of Webster vs. Belote, 103 Fla. 976, 138 So. 721; Finley Method Co. vs. Standard Asphalt Co., 104 Fla. 126, 139 So. 795.

Section 125.08, F.S., as amended, provides various ceilings for amounts of purchases which can be made without competitive bids, depending on the population of the county. According to the latest census, Gilchrist County has a population of 3499 which brings it within the bracket of counties limited to \$300 in making purchases without bids.

You should consider the question of the propriety of your Board making purchases of rock in small quantities, so that no single purchase will amount to \$300. I believe that if the amount to be expended for an item of material such as rock for a proposed project can be reasonably ascertained by engineering determination in advance of the work and if such material is susceptible of delivery and application to the job though purchased in one lot, and the purchase price amounts to more than \$300, the County Commissioners should carry out the spirit and intent of the statute and

advertise for bids. It might also be possible for your Board to advertise for bids to supply rock to the county at a stipulated price over a fixed period of time but for no definite or set amount of rock.

Although the procedure contemplated by your Board in making purchases from the Clerk of the Circuit Court without bids does not appear to be a technical violation of §§839.07, 839.08 and 839.09, F.S., such procedure might well be questioned as being against public policy. I believe, therefore, that the best course for your Commissioners to follow in attempting to obtain the rock at the lowest possible price and at the same time comply with the full intent and spirit of the law would be for the Board to advertise for bids for rock to be furnished to the county at a stipulated price for a certain period of time, but with no set amount of rock to be purchased under the terms of the bid. In that event, I can see no reasonable objection to the Board's consideration and acceptance of a bid by the Clerk of the Circuit Court if said bid is the lowest and best bid offered.

May 15, 1952—052-155.

VACANT BUILDINGS—LEASES—BIDS

QUESTION: Where Charlotte County owns a building for which it has no present use, the same being vacant, may it, pursuant to §§125.35-125.36, F. S., enter into a written lease of said building for one year without the necessity of advertising for bids as contemplated in the above designated sections of the statute?

To: *Honorable Earl Farr, County Attorney, Charlotte County, Punta Gorda, Florida:*

Sections 125.35 and 125.36, F. S., authorize Boards of County Commissioners to sell and convey real or personal property not needed for county purposes, whenever the board concerned determines it is for the best interest of the county to do so.

DeVore v. Lee, 158 Fla. 608, 30 So. 2d 924, held that a lease is a conveyance by the owner of an estate of his interest therein for a term less than his own, and that it passes a present interest in land. See also Chandler et al v. Hart et al (Cal.) 119 Pac. 516 and Brenner et al v. Spiegle (Ohio) 157 N. E. 491.

Since a lease conveys an interest in land, it seems reasonable to us that the statutes under consideration should be construed as including a lease within its terms. We are of the opinion that the provisions of the statute can be properly met only by calling for bids and awarding the lease to the highest bidder, unless the board desires to reject all bids.

October 23, 1951—051-371.

LOWEST RESPONSIBLE BIDDER—DISCRETION IN DETERMINING

QUESTION: Under the terms of §125.08, F. S., which provides that the bid of the "lowest responsible bidder" shall be accepted, does the Board of County Commissioners have the right to exercise well-founded discretion in determining who is the

"lowest responsible bidder" on any basis other than the lowest dollar bid?

To: Honorable James W. West, Attorney for Board of County Commissioners, Sumter County, Bushnell, Florida:

Section 125.08, F. S., as amended by Ch. 27198, Laws of 1951, provides for certain contracts to be let only by competitive bids and states, in pertinent part, that "in each case the bid of the lowest responsible bidder shall be accepted, unless the county commissioners shall reject all bids because the same are too high."

This office has, during the past year, issued several basic opinions relating to competitive bidding in general. See 1949-1950 Biennial Report, pages 183, 185, 187, 188, 381, 382 and 385. In summary, these opinions point out that competitive bidding statutes have for their purpose the securing of economy, protecting the public from collusive contracts and preventing favoritism, fraud, extravagance and imprudence in the expenditure of public moneys. As a result, they are considered as mandatory in application and require strict compliance with their terms. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold.

However, within the framework of this theory of strict construction and enforcement, there is also an area of sound discretion which is recognized as inherent in such statutes in determining the "lowest responsible bidder." This term, as used in §125.08, F. S., does not necessarily mean the lowest bidder, financially only, but is generally accepted as being applicable to the bidder who by experience or otherwise is most capable of doing the work or providing the equipment or materials desired in a satisfactory manner. As stated in the case of *Hodgeman vs. City of San Diego*, 53 Cal. App. 2d 610, 128 P. 2d 412, the term "lowest responsible bidder" used with respect to competitive bidding means the lowest bidder whose offer best responds in quality, fitness and capacity to the particular requirements of the proposed work. See Vol. 25 Words and Phrases, Perm. Ed., page 714, et seq., for numerous other cases to this same effect.

Our own Supreme Court, in the case of *City of Pensacola vs. Kirby*, 47 So. 2d 533, enunciated this general rule as follows:

"While the law imposes no mandatory obligation upon a public agency in respect to the letting of competitive contracts that will require the agency in every state to consider the lowest dollars and cents bid as being 'the lowest responsible bid' to the exclusion of all other pertinent factors that may be taken into consideration, the law does require that where discretion is vested in a public agency with respect to letting public contracts on a competitive basis, the discretion may not be exercised arbitrarily or capriciously but must be based upon facts reasonably tending to support the conclusions reached by such agency." See also *Culpepper vs. Moore*, Fla., 40 So. 2d 366, and *Willis vs. Hathaway*, 95 Fla. 608, 117 So. 89.

In essence, then, the term "lowest responsible bidder" as used in §125.08, does not limit the awarding authority to selecting

the one bid which is less than all others, but permits the board of county commissioners to exercise a certain discretion to determine the bidder's fitness in other respects, such as his integrity, his ability to carry out the contract, his experience, and his general reputation, and where the bidding is for materials or equipment, the board may well take into consideration the capacity, efficiency, cost of maintenance or repairs, and the suitability of the equipment to a particular task, or other qualifications which are found necessary to consider in order best to determine the advisability of purchasing a particular style or type of equipment or material. In other words, the determination of who is the "lowest responsible bidder" is not merely a matter of arithmetic, but contemplates many other relevant factors.

However, as indicated throughout the applicable court decisions, the discretion vested in the board of county commissioners or other awarding authority must not be exercised arbitrarily or capriciously but must be based upon facts which will support the conclusion reached. Therefore, in those cases where the board of county commissioners should determine that the lowest dollar and cents bidder is not the "lowest responsible bidder," it should make sure that the material facts and reasons for rejecting the lowest bid in favor of a higher bid are clearly understood, specifically documented, and made available for public inspection and possible review by the courts. The burden of showing that the discretion vested in the board has been properly exercised rests upon such board, and any contracts made under such statutes must be clearly free of any taint of favoritism, fraud, collusion, arbitrariness or capriciousness. But if properly exercised in conformance with the intent and purposes of the statute, as outlined above, the board does have authority, in my opinion, to award a bid to other than the lowest dollar bidder and your question is therefore answered in the affirmative.

November 2, 1951—051-396.

PERSONAL PROPERTY—BIDS FOR SALE— ADVERTISEMENT

QUESTION: Under §§125.35, 125.36 and 125.08, F. S., is the board of county commissioners of Manatee county required to advertise for bids for the sale of personal property?

To: *Honorable J. Ben Fuqua, County Attorney, Manatee County, Bradenton, Florida:*

Sections 125.35 and 125.36 authorize the counties to sell real and personal property not needed for county purposes whenever the board of county commissioners shall determine that it is in the best interest of the county to do so.

Neither §§125.35 nor 125.36 places any such restriction on the sale of personal property. Accordingly, I see nothing in these two sections of the statutes which requires the board of county commissioners to advertise for bids for the sale of personal property, as opposed to real property.

As for §125.08, as amended by Ch. 27198, Laws of 1951, I do not interpret this section to be applicable to the instant case.

Rather, \$125.08 refers to purchases to be made *by* the county, rather than purchases made *from* the county by others.

From a strictly legal standpoint, then, I find nothing which would require that the Board of County Commissioners advertise for bids for the sale of personal property of the county. However, as a matter of public policy and good business, it would appear to be in the best interest of all concerned for the Board to advertise for and obtain bids on such sales, wherever practicable, even though not required to do so. Certainly, nothing would be lost by adopting such a procedure, and it would eliminate any possibility of favoritism in such transactions. In any event, I would certainly recommend that the Board obtain reliable estimates or appraisals of the property prior to sale, especially when bidding is not to be required, so as best to protect the interest of the county and assume a fair and equitable sale price.

May 18, 1951—051-126.

DONATION—WOMAN'S CLUB—CLUB HOUSE

QUESTION: Please advise me by return mail. May the Board of County Commissioners of Santa Rosa County, Florida, legally make a donation to the Woman's Club or Clubs for the purpose of constructing a Club House?

To: *Honorable J. E. Temples, Chairman, Board of County Commissioners, Santa Rosa County, Milton, Florida:*

The purposes for which taxes may be levied are set forth in Cooley on Taxation, Vol. 1, 4th Edition, page 212, paragraph 87, as follows:

"Public purpose of taxation.—It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose."

And in *Gessner et al. v. Del-Air Corporation*, 17 So. 2d. 522, Headnote 1, states:

"County commissioners have only such powers as are granted them by statute and the Constitution, and where there is doubt as to the existence of authority it should not be assumed."

In my opinion, under §5, Art. 9, Florida Constitution, your board of county commissioners, in the absence of special statutory authority, is not authorized to expend county funds for the purpose of constructing a club house for a private organization.

Your question is therefore answered in the negative.

May 21, 1951—051-130.

JUSTICES OF PEACE—SUPPLIES AND EQUIPMENT—FURNISHING

QUESTION: Are boards of county commissioners required to purchase and furnish supplies and equipment to justices of the peace?

To: *Honorable Harry A. Johnston, County Attorney, Palm Beach County, West Palm Beach, Florida:*

In an opinion of this office dated January 8, 1945, (AGO 045-6) the following reply was given to a similar inquiry:

"I am unable to find any statutory authority in the county commissioners for supplying office space, furniture, fixtures, record books, or seals to a justice of the peace. I concur in the opinion of former Attorney General Landis, reported on page 625, Biennial Report of the Attorney General, 1931-1932, wherein he held that all such expenses were to be borne by the justice of the peace and paid out of his fees."

I believe that this opinion and the provisions cited therein are correct and therefore concur in the conclusions reached in said opinions.

May 22, 1951—051-132.

COUNTY JUDGE'S COURTS—PROSECUTING ATTORNEYS —LEGAL DUTIES

QUESTION: Is a county prosecuting attorney employed by a board of county commissioners under and subject to the provisions of §§125.03 and 125.04, F.S., under any legal duty with respect to preliminary hearings for persons charged with offenses not triable in the court in which the preliminary hearings are held?

To: *Honorable Cecil A. Rountree, County Prosecuting Attorney, Chipley, Florida:*

Section 125.03 provides for the employment by the board of county commissioners of an attorney to prosecute all persons charged with the commission of any kind of offense against the state in or before the county judge's court, while §125.04 provides for a salary and conviction fees to be paid such attorney. Neither these statutes nor any other provisions of law require such prosecuting attorney to perform any service whatever in any court other than the county judge's court.

It is my opinion that said statutes contemplate that an attorney employed thereunder shall prosecute only cases in which there can be a trial and conviction in the county judge's court and in which such attorney may become entitled to conviction fees in the event the defendants are convicted; and that no duty is imposed upon such attorney by said statutes, or by any other provision of law, to attend or perform any services in connection with a preliminary hearing held by the county judge for the purpose of determining whether a defendant should be bound over to answer a higher court.

Therefore, your question is answered in the negative.

May 23, 1951—051-134.

BRANCH COUNTY OFFICES OUTSIDE COUNTY SEAT

QUESTION: May a board of county commissioners establish branch county offices in places outside the county seat for the use

of residents of outlying areas having transactions to perform with various county officers and departments?

To: Honorable Ted Cabot, Clerk of the Circuit Court, Ft. Lauderdale, Florida:

Section 4, Art. XVI, of the State Constitution, provides that "all county officers shall hold their respective offices, and keep their official books and records, at the county seat of their counties; and the clerk and sheriff shall either reside or have a sworn deputy within two miles of the county seat."

"Where, by law, an officer, such as a county, city, town or school officer, is authorized to perform the duties of his office at a particular place, action at a place not authorized by law is ordinarily invalid. Thus, if a place of meeting of a county board is designated by law, all meetings must be held at that place; otherwise, the action of the board will be invalid and ineffectual. And a court or judge required by statute to act officially at a certain place cannot act at another place" (43 Am. Jur. 70, §251); see also annotation in 33 L. R. A. 85-96). "The powers and authority of public officers are usually fixed and determined by law, and they have only such power and authority as are clearly conferred or necessarily implied from the powers granted" (67 C. J. S. 365, §102).

It is the spirit of our constitution and statutes that the official meetings for the transaction of business by the boards of county commissioners and like boards in the state shall be publicly conducted at a known place in the county seat (*Motes v. Putnam County*, 143 Fla. 134, 196 So. 465). An act of the Legislature providing for the holding of trials in civil cases, by the circuit court, at a place other than the county seat is invalid (*Mack v. Carter*, 133 Fla. 313, 183 So. 478). Ch. 24819, Laws of 1947, (a special act), authorizing Pinellas county to acquire sites, offices and buildings outside its county seat for the purpose of housing officers and agencies of the county was upheld against the contention that the act in effect was an attempt to remove the county seat, by special act and not by general law. (*State v. Pinellas County*, 160 Fla. 549, 36 So. 2d. 216). It does not appear from this special act and court opinion that any official action was contemplated in the branch offices for the county.

We gather from the above and foregoing authorities that official action by county officers may be exercised only where authorized by law. Although there are many official acts that may be performed away from the county seat by county officers, such as arrests, the service of process and many other things by the sheriff; there are many that must be performed at the county seat, such as official meetings by the board of county commissioners and probably the county school board, official action by the county judge, the recording of instruments by the clerk of the circuit court for purposes of constructive notice, and many others that might be mentioned. There are many acts of county officials that are purely ministerial which probably need not be performed at the county seat; such as receiving tax returns by the tax assessor. Should branch offices be established for the use of the clerk of the circuit court, the county judge, and other officers

charged with official duties involving discretion it is probable that such official action would have to be taken at the county seat. For example, should a deed or mortgage be offered for recording at the branch office it is probable that constructive notice would not begin until such instruments were lodged in the office at the county seat. A like rule would probably apply to instruments filed with the county judge, such as claims filed in probate proceedings. These observations are examples and should not be taken as exclusive, as there are many others that might be similarly affected.

Within the above limitations it seems probable that branch offices might be established in places other than the county seat for the convenience of the public. However, when so established care must be exercised so that no undue injury may be suffered by the public by reason of the above mentioned rules of law.

May 26, 1951—051-139.

COUNTY—INSURANCE—THREE-YEAR CONTRACT— PURCHASE

QUESTION: By purchasing insurance on county property on a three-year policy basis, the county can accomplish a considerable savings. Is a county authorized to make such a purchase?

To: *Honorable Jess Mathas, Clerk Circuit Court, Volusia County, Deland, Florida:*

The Florida Supreme Court in the case of *State v. City of Miami*, 150 Fla. 270; 7 So. 2d. 146, stated:

"Contracts for payment of current county or municipal expenses are not within constitutional or statutory prohibition against incurring of county or municipal indebtedness, whether contracts run for one year or several years, provided revenues which will be available annually are found to be sufficient to meet current expenses including amounts to become due under such a contract."

The request for opinion does not state whether this is a term policy or one payable on the installment premium payment plan. In either event it is difficult to see how any taxpayer could complain. If this insurance were purchased on a one-year basis the full one-year premium would be required; and for illustrative purposes let us take the figure of 100 as representing the one-year premium. Using this factor the insurance for three years on a one year contract basis will cost: 100-100-100. The cost of such insurance on a three-year term or a three-year installment payment premium basis will be less. Term insurance for three years will cost approximately: 100-80-80; and insurance for three years purchased on an installment premium payment plan will cost approximately the same as term insurance. Under one installment plan, insurance would be written on a one-year basis with right of renewal for two additional years by payment of the premium at the indicated reduced rate on each anniversary date of the policy. Under the other plan the contract would be issued on a three-year basis with automatic cancellation unless the premiums are paid on the anniversary dates at the indicated reduced rate during the term of the contract. As to either of such

installment premium payment plans, if the required premium is not paid on the anniversary dates and the contract is terminated the cost to the county in any event would be no more per year than for a one-year contract, and if the cancellation did not take place until after the payment of the second premium the cost to the county would be less per year of insurance than on a one-year basis.

Assuming that the insurance purchase contemplated is otherwise a legal purchase, I am of the opinion that a board of county commissioners may properly insure county property on a three-year policy contract basis.

Your question is therefore answered in the affirmative.

July 6, 1951—051-200.

COUNTY PROSECUTING ATTORNEY—DUTIES— AFFIDAVITS—SEARCH WARRANTS

QUESTION: Under what circumstances, if at all, does a county prosecuting attorney, employed under the provisions of §125.03, F. S., have the duty to draft affidavits and other proceedings, including search warrants, to search for stolen property?

To: *Honorable A. Max Brewer, County Prosecuting Attorney, Brevard County, Titusville, Florida:*

Neither §§125.03 or 125.04 F. S., nor any other provisions of law, require such prosecuting attorney to perform any service in connection with any court other than the county judge's court.

When recently called upon to construe the aforementioned sections of Florida Statutes with respect to certain other duties of a "Section 125.03 county prosecuting attorney", I stated that it was my opinion "that said statutes contemplate that an attorney employed thereunder shall prosecute only cases in which there can be a trial and conviction in the county judge's court and in which such attorney may become entitled to conviction fees in the event the defendants are convicted." (Opinion No. 051-132, dated May 22, 1951).

In that opinion I advised that no duty is imposed upon an attorney employed under and subject to the provisions of said statutes, or by any other provisions of law, to attend or perform any services in connection with a preliminary hearing held by the county judge for the purpose of determining whether a defendant should be bound over to answer a higher court.

It would, therefore, necessarily seem to follow from my construction of said sections of the statutes and from my aforementioned opinion that a county prosecuting attorney, employed pursuant to §§125.03 and 125.04, is not under a duty to draft affidavits or other proceedings, including search warrants, to search for stolen property unless the offense is one which falls within the criminal jurisdiction of the County Judge's Court whereby the accused would be tried, and subject to conviction, in that court.

July 16, 1951—051-215.

COUNTY PROSECUTING ATTORNEY—EMPLOYMENT

QUESTIONS: 1. Is it compulsory that the members of the Board of County Commissioners of Lafayette County employ a county prosecuting attorney at a regular annual fixed salary?

2. May the members of the Board of County Commissioners of Lafayette County employ an attorney to advise them only when needed?

To: Honorable Sidney C. Edwards, Clerk Circuit Court, Mayo, Lafayette County, Florida:

Sections 125.03 and 125.04, F.S., provide for the employment and salary of county prosecuting attorneys in those counties of Florida wherein there is no county court or criminal court of record. These statutes appear to apply to Lafayette County. Your first question is accordingly answered in the affirmative.

In reply to your second question, it is my opinion that the power of discretion rests with the members of the Board of County Commissioners of Lafayette County as to the employment of an attorney to advise them, and to represent the county in the prosecution and defense of all legal causes (see §125.01 (3), F.S.).

August 5, 1952—052-240.

BOARD OF ADJUSTMENT MEMBERS—AUTHORITY—SUCCESSORS—APPOINTMENT

QUESTIONS: 1. Under the terms of Ch. 22101, Laws of 1943, do members of the Board of Adjustment continue in office, although their three year term of office has expired, until their successors have been appointed and qualified?

2. Under the terms of Ch. 22101, Laws of 1943, is the authority of the Board of Adjustment limited to appeals from decisions and rulings of administrative officers only?

To: Honorable G. D. Auchter, Chairman, Board of Adjustment, Jacksonville, Florida:

The members of the Board of Adjustment are "county officers" within the terms of §14 of Art. 16 of our State Constitution, requiring state, county and municipal officers to continue in office after the expiration of their respective terms until their successors are duly qualified. Therefore, it accordingly follows that your first question should be answered in the affirmative. See: 67 C.J.S., §2, pages 101-103; *State v. Botts*, 134 So. 219, 101 Fla. 361; *McSween v. State Live Stock Sanitary Board of Florida*, 122 So. 239, 97 Fla. 749, 65 A.L.R. 508; *State v. Hocker*, 22 So. 721, 39 Fla. 477.

In respect to your second question, your attention is called to the language used by the legislature in said Ch. 22101. From said language it is certainly evident beyond all question that the legislature intended that the Board of Adjustment should have the power, among others, to consider appeals from decisions and rulings of administrative officers made in the enforcement of said Act, as well as appeals from orders and resolutions of the Board of County Commissioners adopted pursuant to said decisions and rulings.

We think the word "*Board*," as used in §7 of said Ch. 22101, unquestionably includes the Board of County Commissioners. Furthermore, we believe the term "any administrative official" is a generic term and as used in the act, and when considered in relation to the obvious purpose of the act, includes the Board of County Commissioners. To give it another meaning would be contrary to the legislative intent of providing an aggrieved person the right of an appeal to the Board of Adjustment. For example, it has been held that:

"Officers that are neither judicial nor legislative necessarily belong to the executive department of government, and are 'executive' or 'administrative' officers; those terms being equivalent and, since the general scope of the duties of county commissioners is the administration of the county affairs, they are 'administrative officers' rather than judicial or legislative officers. *Sheely v. People*, 129 p. 201, 54 Colo, 136."

Then too, the Supreme Court of Florida has held that Art. 8 of the Constitution recognizes the existence of County Commissioners in each county as an *administrative board* for county affairs. See *Whitney v. Hillsborough County*, 99 Fla. 628, 127 So. 486; *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527.

Your second question is answered in the negative.

COUNTY ANNUAL BUDGET

February 27, 1952—052-57.

DUVAL COUNTY BUDGET COMMISSION—SUPPLEMENTAL BUDGET—EXPENDITURE

QUESTION: Whether or not the Duval County Budget Commission can approve a supplemental budget which will allow the expenditure of the unforeseen revenue during the present fiscal year. You also inquire as to whether or not the members of the Budget Commission would incur any personal liability in the event that this action was taken and later determined to be illegal by court action.

To: *Honorable J. Turner Butler, Attorney, Duval County Budget Commission, Jacksonville, Florida:*

Section 9 of Ch. 21874, Laws of 1943, provides, among other things, that "Every such budget so adopted by the County Budget Commission for each such board shall be final and shall have the force and effect of fixed appropriations determined by the authority of law which shall not be altered or amended by any such board or officer or member thereof."

Apparently this act makes no provision for consideration by the County Budget Commission of an amended or supplemental budget by any of the boards under its authority. Certain sections of the School Code, however, do appear to make provision for the appropriation and expenditure of unanticipated revenues by a county school board. §237.19 (2), F.S., provides, in part, as follows:

"Any receipts to any fund in excess of the total budgeted for receipts shall be used to increase the reserve for

contingencies and may be appropriated in like manner by amendment of the budget."

Section 237.22, Florida Statutes, provides, in part, as follows:

"And provided further that reserve for contingencies or any part thereof may be appropriated by the county board of any such county with the approval of the state superintendent and no approval thereof shall be necessary by the county budget commission."

In the Supreme Court case of C. W. Chase, Jr., et al, as Chairman and members of and constituting the Dade County Budget Commission vs. Board of Public Instruction of Dade County, 52 So. 2d. 124, the Supreme Court made the following observation:

"The legislature undoubtedly intended the provisions of the school code and the budget act to operate in pari materia when possible but when they are in conflict and both cannot operate, the school code must give way to the budget act. The school code and the amendments thereto show conclusively that the legislature was conscious of the budget act operating in certain counties and made different provisions for budgeting school funds in counties not having a budget commission from those having such a commission. For instance, section 237.19 was intended to control budgeting in counties having no budget commission while section 237.22 controls budgeting in counties having a budget commission.

"Section 9 of Ch. 21874 (the budget act) among other things provides that every such budget so adopted by the county budget commission for each board shall be final and shall have the force and effect of fixed appropriations determined by the authority of law which shall not be altered or amended by any such board or officer or member thereof. The act authorizes the budget commission to make and control the budget receipts and expenditures of boards of county commissioners, boards of public instruction, county welfare boards and all other county boards and commissions. After all this is done and the budget regularly adopted by the budget commission it becomes final and whether or not it can be reopened under any circumstances we do not have to decide, but certainly it becomes binding on both the commission and the boards."

Since the Supreme Court itself raised the question as to whether or not a county budget commission can approve an amended or supplemental budget, but failed to provide an answer to the question, we have no clear authority to cite as a basis for an opinion. We must therefore rely upon an attempt to construe the provisions of the School Code together with the provisions of the Budget Act.

Section 237.22 above cited would seem to indicate that unanticipated revenues may be appropriated by the County School Board upon approval of the State Superintendent and that no approval of such action is necessary by the County Budget Commission.

Section 237.19, subsection (2), F.S., specifically provides for the disposition of unanticipated receipts under the terms of this

act and it is mandatory upon the Board to use said funds to increase the reserve for contingencies. It further provides that said funds may be appropriated in like manner by amendment of the budget. A reading of the above two cited statutes would indicate that no action upon the part of the Budget Commission is necessary under the circumstances here involved. However, the Supreme Court has stated in the case above cited that where there is a conflict between the school law and the budget law the budget law must prevail. Since this is the case, although there may not appear to be a conflict, I do not believe it would be advisable for the School Board to rely solely on \$237.19 (2) and \$237.22 and to proceed to budget and spend the funds in question without approval by the Budget Commission. Since the Budget Act is silent on the question of whether or not the Budget Commission may consider and approve amended budgets, there does not appear to be any conflict with the School Code and it may well be that the Supreme Court would rule that approval of the Budget Commission of an amended budget as herein contemplated would not be required. It seems to me that it would be logical, however, for the School Board in amending its budget, to allow for the unanticipated revenue, to submit said amended budget to the Budget Commission for its approval since that approval is required under all other circumstances. In other words, I believe that the safest course would be for the School Board to comply with the procedure set forth in the School Code and also to request approval of the Budget Commission of its amended budget. I certainly do not believe that such procedure would be illegal in the absence of any Supreme Court ruling to the contrary and in my opinion the members of the Budget Commission and of the County Board of Public Instruction would not subject themselves to any personal liability in following this course.

I am advised that on several occasions the Dade County Budget Commission has approved amendments submitted to it by the Dade County Board of Public Instruction of its budget and such action has not been questioned.

November 29, 1951—051-434.

COUNTY ANNUAL BUDGET—AMENDMENT—NOTICE —PUBLICATION

QUESTION: Where a County Budget, made pursuant to the requirements of Ch. 129, F. S., as amended, has been adopted and becomes final, may it be amended so as to provide funds for items of expense not contemplated or foreseen when the said budget was adopted, and, if so, what procedure is necessary to perfect such amendment?

To: Board of County Commissioners, County Courthouse, West Palm Beach, Florida:

Several sections of Ch. 129, F. S., were amended by Ch. 26874, Laws of 1951, one of which amendments divided County funds into six separate funds, one of which is the "Road and Bridge Fund." The Road and Bridge Fund above mentioned is described in §129.02 (2), F. S., as amended. You state in your request for opinion that it has become necessary that some of the County's road and bridge equipment be replaced for efficient operation of the Department in the future. It is, therefore, presumed that the contemplated amend-

ment is the increase of one or more items or accounts within the said Road and Bridge Fund. Under §129.06 (2), F. S., as amended, it is provided that the Board of County Commissioners may, at any time within a fiscal year "amend a budget for that year." In this connection, the procedure is set out in subsection (2) (a)-(d).

However, we find no provision expressly requiring the publication of a notice of any such contemplated amendment as is required of the original budget.

Your attention is directed to an opinion of this office, reported in the 1945-6 Biennial Report, beginning on page 249, which opinion stated in part as follows:

"However, I can well see that occasions may arise which could not be foreseen by the budget makers and where to hold surplus funds might cause a great loss to the county; therefore, it is my opinion, that if, as and when it is determined by your board or the county commissioners, in the counties where they fix the budget, that an emergency has arisen, and it is to the best interest of the county that the surplus funds be used to meet such emergency, then a supplemental budget might be set up, *the proposed supplemental budget be advertised in the same manner as the regular annual budget*, and that a meeting be held at an appointed time for the purpose of considering and adopting such supplemental budget; in other words, proceed exactly the same as if you were adopting your yearly budget. I am of the opinion that after the adoption of same, you can then use the money in accordance with the adopted supplemental budget."

It is, therefore, apparent from the above and foregoing that you are authorized to amend any item or account in your Road and Bridge Fund Budget; provided such amendment comes within the authority granted in §129.06 (2) (a)-(d), F. S. Although we find no express provision in the law as amended requiring a publication of notice of such amendment, it was held by this office in the above mentioned opinion that notice of the amended or supplemental budget should be published. We, therefore, feel that as a condition to amending your budget as contemplated that notice should be given of the amendment to the budget (I do not think it necessary to give notice of anything except the amendment) in the same manner as notice of the original budget is published.

November 28, 1952—052-322.

COMMISSIONERS—TRANSFER OF FUNDS IN ANNUAL BUDGET

QUESTION: May monies appropriated in a county budget for the road and bridge fund be thereafter transferred to another fund by the Board of County Commissioners so as to create a new fund in the county budget, which will be used for recreational purposes, pursuant to the provisions of Ch. 418, F.S.?

To: *Honorable Jack W. Greenhut, County Attorney, Pensacola, Florida:*

You have explained that the Board of County Commissioners

has not elected to exercise the powers granted it under Ch. 418, F.S. and consequently no funds have been appropriated pursuant to its provisions. The law contemplates the establishing, equipping and maintaining of county recreation centers. It is also possible under the chapter for the county to issue bonds or after the required appropriate referendum, to levy a "playground and recreation tax."

Chapter 129, F.S., covers the subject of the county's annual budget, setting out the various funds to be included in such budget. Section 129.02 (2), shall contain an estimate of receipts by source and balances and "an itemized estimate of expenditures that need to be incurred to carry on all work on roads and bridges . . ."

The final adoption of the budget ". . . shall have the effect of fixed appropriations and shall not be amended or altered or exceeded except as provided in this chapter." [Sec. 129.06 (1), F.S.]. The Board may, under certain circumstances, amend the budget as set forth in §29.06 (2), (a), (b), and (c), F.S. Transfers are permitted between funds only for the purposes enumerated in §129.06 (3), (a) (b). We fail to see how the anticipated transfer would fall within either of the situations where transfers are permitted. This is particularly true since you have advised us your belief that the funds in question probably are derived from the special levy for road and bridge purposes, permitted under §343.17 F.S., and are so earmarked. The statute limits the expenditure of these funds to work on public roads and bridges in the county.

Accordingly, the question is answered in the negative.

In view of the conclusion reached, it is not necessary for us to consider the authority and control of the Budget Commission over such anticipated transfer.

December 6, 1951—051-447.

SHERIFFS—OFFICE EXPENSES

QUESTIONS: 1. What is the intent, meaning and general application of sub-paragraph (7), §2, Ch. 26947, Laws of 1951; §125.45 (2) (g) F.S., which provides that the county commissioners of each county shall pay "local and long distance telephone and telegraph bills necessary in the apprehension of criminals"?

2. Specifically, what persons or cases would fall within the term "criminals" as used in the cited section?

3. What accounting procedures and forms, satisfactory to the State Auditor and your office, could be established to enable the various sheriffs' offices and boards of county commissioners to implement the payment of such expenses?

To: *Honorable Alex D. Littlefield, Secretary, Florida Sheriffs Association, Deland, Volusia County, Florida:*

Chapter 26947, Laws of 1951, is an act relating to the payment by the boards of county commissioners of certain expenses of operation, maintenance and equipment for the various sheriffs' offices throughout the state. The law, in Section 1, authorizes the boards of county commissioners to pay certain expenses in general, apparently in the discretion of the boards, while §2 of the act sets up certain categories of expenses which are made mandatory upon the boards to pay. (See opinion 051-252, dated August 2, 1951, copy enclosed). Among the items contained in §2 is one which requires the boards of county commissioners upon the requisition

of the several sheriffs to pay "local and long distance telephone and telegraph bills necessary in the apprehension of criminals." It is this particular paragraph of the law with which we are here concerned.

In essence, the law places an obligation upon the boards of county commissioners to pay for all telephone and telegraph bills incurred by the sheriffs' offices when such calls or wires are "necessary in the apprehension of criminals." Therefore, your first and second questions are concerned with the dual problem of what telephone and telegraph bills are to be considered as directly connected with the "apprehension of criminals" and, having been determined to be in that category, which ones are "necessary." Accordingly, it seems best to combine your first and second questions, and to consider first the scope and meaning of the phrase "apprehension of criminals," as used in the cited section of the statute.

It is my opinion that when the legislature utilized the term "criminals" it was using it in a broad and general manner, and not in a restricted sense which would limit it to "persons convicted of crimes." Such a restricted definition of the word would, in the instant case, so limit the application of the law as to make it of slight value to the sheriffs' offices in obtaining reimbursement for their expenses. In its broader and generally accepted application, the word "criminals" is defined as relating to crime generally, or pertaining to the administration of penal as opposed to civil laws, and it seems only reasonable and logical to presume that the legislature intended the word in that sense. Therefore, it is my opinion, based on a reading of the entire act, that the legislature meant to include in the word "criminals" all persons charged or accused of an alleged or actual violation of the criminal laws of this state and that the term "apprehension of criminals" is to be construed in its broadest sense to include all cases wherein the sheriffs' offices in the performance of their duties would seek to arrest, detain or take into custody any person for a possible violation of the criminal statutes. Under such a broad definition, it seems also reasonable to assume that the phrase would include cases wherein delinquent children would be involved, who, although not classified as criminals, may have violated criminal statutes and would be sought by the sheriff for the purpose of taking such a child into custody.

It appears that all telegraph and telephone bills incurred by the sheriff in the performance of his law enforcement duties, when such calls or wires are directly connected with the arresting, detaining, or taking into custody persons involved in a violation of the criminal laws of the state, would be chargeable to the board of county commissioners under this statute, provided such calls or telegrams were "necessary."

As to what telephone calls or telegrams would be considered "necessary," no general rule of law can be laid down, as each situation would have to be governed by its own particular facts and circumstances. By way of legal definition, the word "necessary" does not always mean indispensable, but is generally construed as meaning reasonable, appropriate, needful, suitable, and proper (See Vol. 28, Words and Phrases, p. 161). Hence, it seems that a "necessary" telephone call or telegram within the purview

of this act would include any call or wire where the use of such means of communication would be a reasonable, appropriate, suitable and proper method of exercising the duty vested in the sheriff to apprehend a person in connection with his law enforcement functions.

In the final analysis, however, each individual telephone call or telegram would have to be examined in the light of its own particular circumstances, and the burden of proof would be upon the sheriff to justify the necessity of any particular call or wire when requested to do so by the board of county commissioners. This, as I see it, should raise no serious problem unless some sheriff's office was so extravagant in the use of telephone calls and telegrams as to indicate an abuse of discretion. These observations appear to answer your first two questions.

As to your third question whereby you ask what accounting procedures and forms could be established to implement the payment of such bills, I must point out that this office does not prescribe forms or procedures, but by virtue of §116.07, F. S., it is the duty of the State Auditor to prescribe forms for the sheriffs and boards of county commissioners of the state. However, in an effort to be of some assistance to you, it is suggested that a simple record could be developed for use by each sheriff's office, on which each call or telegram to be charged to the board of county commissioners could be listed, showing the name of the party called or wired, the person or case involved, and a brief indication of the reason for such communication. These records perhaps could be made in duplicate, and at the time of submission of bills to the board of county commissioners, one copy of such brief record could be forwarded for the examination and approval of the board. In this way, it seems that an accurate record of expenditures for telephone and telegraph service could be maintained, and the boards of county commissioners would be provided with substantiating data for each such item for which they are obligated to pay.

I have discussed this problem with the State Auditor's office, and they have indicated their willingness to assist you in developing such a form, or other suitable procedures, and at such time as representatives of the parties concerned may meet for this purpose, I shall be glad to have my office cooperate fully in every way possible.

COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM

August 15, 1951—051-274.

COUNTY BOARD PUBLIC INSTRUCTION—SCHOOL LUNCH PERSONNEL—RETIREMENT STATUS

QUESTIONS: (1) Are all school lunch personnel employees of the County Board of Public Instruction regardless of the funds from which they are paid?

(2) Are all school lunch personnel, except members of the Teacher Retirement System, eligible under and subject to the provisions of the County Officers and Employees Retirement Act?

(3) As a corollary of question (2), can school lunch per-

sonnel be classified as day laborers, within the meaning of Supreme Court Decision *Watson vs. Lee* (24 So. 2d 798)?

(4) Are all school lunch personnel covered by the Workmen's Compensation Act?

To: Honorable Thomas D. Bailey, Superintendent, Department of Education:

Question (1) is answered in the affirmative. (Reference to AGO 048-305.

Question (2) is answered in the affirmative. Although the employees in question may not in some instances be qualified under the law to participate in the State Teacher Retirement System, they are employees of the County School System and as such they are in my opinion eligible to receive the benefits provided by §134.02, F. S., which is the County Officers and Employees Retirement Act.

Question (3) is answered in the negative. I am advised that school lunchroom personnel are employed for the school year at a fixed monthly salary. Such employees are by the nature of their duties in the preparation and serving of food to school children, required to possess specialized skills or ability and in my opinion are in no sense casual or transitory day laborers as defined in the Florida Supreme Court decision, *State ex rel Watson, Attorney General vs. Lee*, State Comptroller, 24 So. 2d 798.

Question (4) is answered in the affirmative. (AGO 049-135)
October 10, 1951—051-354.

JACKSON COUNTY HOSPITAL CORPORATION—OFFICERS AND EMPLOYEES

QUESTION: Are the officers and employees of Jackson County Hospital Corporation in their maintenance and operation of Jackson Hospital at Marianna, Florida, in pursuance of Ch. 19901, Laws of 1939, as amended, county officers and employees within the contemplation of Ch. 134, F.S., relating to county officers and employees retirement system?

To: Honorable C. M. Gay, State Comptroller:

Congress of the United States has provided for the extension of certain features of the Federal Social Security Act to officers and employees of the states and their political subdivisions and instrumentalities not within the purview of state and local public retirement systems (64 Stat. 514, 42 U.S.C.A. 418). This federal act was recognized and made effective in Florida by Ch. 26841, Laws of 1951. Thus, it is to be noted that if such officers and employees of Jackson County Hospital Corporation are or were ever eligible for participation in the retirement system provided by Ch. 134, they are not eligible for the extended social security benefits under the federal and state legislation mentioned.

"Officers and employees" are defined in §134.02 as including all full time officers and employees except day laborers, who receive compensation for service rendered from county funds, or who receive compensation for employment or service from any agency, branch, department, institution or board of any county in the state

for service rendered such county from funds from any source provided for the employment or service regardless of whether the same is paid by county warrant or not, provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salary by the employee county agency or county officer and shall not include amounts allowed for subsistence or travelling expenses.

It is unnecessary to enumerate amendments of Chapter 19901 since its enactment. Relevant provisions of the act are mentioned. The entire area of Jackson County, Florida, was created into a public hospital district, for the purpose of the building, maintenance and operation of a public hospital at Marianna, Florida, primarily for the benefit of citizens and residents of that county. Jackson County Hospital Corporation, a public non-profit corporation was created for the purpose of building, maintaining and operating such hospital, directors thereof being a board of trustees appointed by the Governor, as provided in the act. The board of trustees of said corporation was vested with the complete charge and management of the building, equipping, maintenance and operation of said hospital. Conditioned as set forth in the act, the board of county commissioners of said county is required to pay to the hospital corporation annually \$12,000 of the race track funds received by the county and, under stated circumstances, levy an ad valorem tax of 5 mills, for the purposes, among other things, of the maintenance and operation of said hospital.

Race track funds allotted to a county and funds derived from ad valorem taxes in a county must be used for a county purpose (Art. IX, §15, Florida Constitution; §§550.13, 550.14, F.S.; Prescott v. Board of Public Instruction (Fla.) 32 So. 2d. 731; Lynn Haven vs. Bay County (Fla.) 47 So. 2d. 894). Thus, the Board of County Commissioners of Jackson County lawfully could pay such amounts annually from the race track funds allotted to that county, or lawfully could assess up to the millage limit mentioned for funds for the use of said hospital, only if such tax monies were being used for a valid county purpose in Jackson County. This being true, then it would seem to follow that Jackson County Hospital Corporation is an "agency" of Jackson County within the meaning and intent of such word as it is used in §134.02, F.S.

In view of the foregoing, in my opinion the above question properly is answered as follows:

The full time officers and employees, except day laborers, of Jackson County Hospital Corporation engaged in the maintenance and operation of Jackson Hospital under and as authorized by Ch. 19901, are officers and employees of an agency of Jackson County, Florida, within the meaning and intent of "officers and employees" as defined in §134.02. Hence, it follows that such officers and employees have either had the opportunity to participate or are now required to participate in the county officers and employees retirement system as set forth and provided in Ch. 134, F.S.

December 5, 1951—051-441.

COUNTY OFFICERS AND EMPLOYEES RETIREMENT SYSTEM—SMALL CLAIMS COURT JUDGE

QUESTION: Is the Judge of a Small Claims Court estab-

lished under authority of Ch. 26920, Laws of 1951, eligible to participate in the benefits of the County Officers and Employees Retirement System?

To: Honorable C. M. Gay, State Comptroller:

Chapter 26920, Laws of 1951, establishes under certain conditions a Small Claims Court in each county of the state and provides for the appointment and the election of a Judge of such court.

Upon the creation of the court under the provisions of the Act it is provided that the Governor shall by appointment designate a Judge for such court who shall serve in such capacity until the election of his successor. The Act further provides for the remuneration to be paid to the Judge of the court and the source from which it shall be derived, that being exclusively from fees for services rendered. The territorial jurisdiction of the court is limited to the county within which the court is created.

Under the foregoing provisions of the statute, the qualified Judge of a Small Claims Court is a county officer, and as such is a person entitled under the terms of the County Officers and Employees Retirement System to participate in the benefits of that system.

The provisions of the Act which require that the compensation upon which benefits are computed, in whatever form paid, shall be specified in terms of fixed monthly salary by the employing county agency or county officer cannot reasonably be considered to apply to a county officer, as the context indicates clearly that such provision applies only to employees of a county officer or agency. The statute since its enactment has been considered to include in the designation of those entitled to participate in its benefits, county officers whose compensation is fixed by statute as derived solely from fees and services rendered to the public, which class of officers includes clerks of circuit courts, county judges, county tax assessors, county tax collectors and others. A Judge of a Small Claims Court comes within this category. The question is accordingly answered in the affirmative.

COUNTY DEPOSITORIES

March 27, 1951—051-65.

TAXING DISTRICTS—CANAVERAL PORT AUTHORITY BONDS

QUESTION: May taxing district bonds, such as port and harbor authority bonds, be received, under §136.01, F.S., as security for the safekeeping and prompt payment of county funds on deposit with county depositories?

To: Honorable C. M. Gay, State Comptroller:

Section 136.01, F.S., requires that banks acting as county depositories shall either furnish satisfactory surety bonds "or make satisfactory deposit, to the credit of the county, of sufficient United States bonds, bonds the payment of whose principal and interest is guaranteed by the United States, federal certificates of indebtedness, state, county and municipal bonds, for the safekeeping and prompt payment" of county funds on deposit with such county depositories. Here we in effect have authority for depositing federal,

state, county and municipal bonds (see Ch. 6932, Laws of 1915, from which derived). Referring to similar statutes we find that state depositories may deposit United States, *state, county and municipal bonds* and county or county school time warrants (§18.11, F.S.); school depositories may deposit federal, state, county or municipal bonds, or bonds guaranteed by the United States (§237.32, F.S.); deposits of board of administration funds may be secured by the deposit of United States, municipal special tax school district, county, and special road and bridge district bonds (§344.17, F.S.). Under §653.10, F.S., state deposits may be secured by United States bonds, or "other satisfactory security." In setting out the legal investments §518.01, F.S., specifically mentions obligations of the United States, states, counties, towns, school districts, bridge and road districts, and similar.

A study of these statutes seems to indicate that the term "municipal bonds," as used in said §136.01, F.S., was probably used in its restricted sense and not its broad sense. The term "municipal" or "municipal corporation," has a limited (meaning cities, towns and villages that have been incorporated) and a broad (meaning all public and quasi-public corporations) meaning (61 C.J.S. 945; 62 C.J.S. 74, §5; 37 Am. Jur. 621, §6). Although the State Constitution (§8, Art. VIII) provides for the establishment of municipalities our courts have held that "the constitution contains no express provision upon the subject of the formation of taxing districts for particular purposes" (*Richardson v. Hardee*, 85 Fla. 510, 96 So. 290, text 291); which is an indication that our courts do not consider that special taxing districts are municipalities in the usual sense of the term. Revenue certificates issued by municipal corporations are not considered as municipal bonds in the usual sense of the phrase (*State v. City of Pensacola*, Fla., 40 So. 2d. 569, text 572). Statutes providing for securing state and county deposits have heretofore received a rather strict construction by this office (1941-2 Biennial Report pages 11 and 12; 1943-4 Biennial Report pages 103 and 186; and 1947-8 Biennial Report pages 15 and 629).

From the above and foregoing observations we feel that the above question should be answered in the negative. We do not feel that Canaveral Port Authority Bonds and similar securities are within the purview of §136.01, F.S.

FINE AND FORFEITURE FUND, COUNTY

January 2, 1951—051-1.

SHERIFF'S AUTHORITY—JAILER AS SERVANT— EMPLOYMENT

QUESTION: Is a sheriff authorized under the law to employ the same person to act as jailer at a salary of \$5.00 a day and also to serve as servant in the jail at \$3.00 per day?

To: *Honorable John H. Treadwell, Jr., Attorney, Board of County Commissioners, DeSoto County, Arcadia, Florida:*

In the case of *Brown v. St. Lucie County*, (Fla.) 153 So. 906, it was held:

"Sheriff who, in exercise of honest and fair judgment, based on necessity, employed servant and guards at jail, held entitled to reimbursement from county at statutory

rate, approval of county commissioners or any judge not being condition precedent thereto."

This case has been cited as authority in numerous instances as justification for the employment by a sheriff of guards and servants to assist him in carrying out his responsibilities to properly operate the county jail. It is noted that emphasis was placed in this case upon a clear showing of necessity on the part of the sheriff in employing such personnel and it is indicated that the sheriff must be in a position to justify such employment in billing the county for their services.

In so far as I know, it has always been considered that both the job of jailer and servant were full-time jobs and therefore should be held by two different persons. I know of no legal prohibition, however, which would prevent the same person holding both jobs.

I think, therefore, that in the final analysis it is the responsibility of a sheriff to decide under the particular circumstances involved, whether or not there is a real necessity for the employment of such personnel and whether or not one person could adequately discharge the duties of both jobs.

In seeking to give a specific answer to your question, I believe it is answered as follows: There is no law which would prohibit the employment of one person to serve both as jailer and servant. Such action, however, would be contrary to established custom throughout the state since both jobs are considered to be full-time jobs and it might therefore be difficult to justify such action in the light of the court's remarks in *Brown v. St. Lucie County*.

Subject to these remarks, your question is answered in the affirmative.

COMPENSATION OF COUNTY OFFICIALS

February 16, 1951—051-32.

COUNTY JUDGE—AS EX-OFFICIO JUDGE OF JUVENILE COURT—REPORT

QUESTION: Is the County Judge of Escambia County required to include in his annual report the compensation paid to him under Ch. 25461, Laws of 1949, for service as ex-officio Judge of the Juvenile Court of said County?

To: Honorable Harvey E. Page, County Judge, Escambia County, Pensacola, Florida:

Section 2 of Ch. 25461, Acts of 1949, which applies only to Escambia County, contains the following provision:

"The compensation of said County Judge, for services as ex-officio judge of said Juvenile Court, shall be two hundred dollars per month, which shall be in addition to all other compensation payable to such county judge under other laws, and shall not be subject to the provisions of Section 145.01, 145.02, 145.03 (as amended in 1947) 145.04 and 145.05, Florida Statutes, 1941, and which shall be paid to him monthly by the county commissioners of said county from the Fine and Forfeiture Fund of said County."

If said statutory provision be constitutional, as to which I express no opinion, it clearly relieves the County Judge of Escambia

County from the duty of reporting his compensation as Juvenile Court Judge to the Board of County Commissioners pursuant to the requirements of §§145.01 to 145.05, F.S.

However, we find nothing in said Ch. 25461 which relieves the County Judge of the duty to report his compensation as Juvenile Court Judge to the Comptroller as required by §116.03, F.S., and I think that such report must be made.

March 10, 1952—052-74.

COUNTY FEE OFFICERS—EXCESS FEES—PAYMENT— FINAL DATE

QUESTION: What is the final date allowed county fee officers on which excess fees may be paid to the county?

To: *Honorable Frank Fee, Attorney, Board of County Commissioners, Saint Lucie County, Fort Pierce, Florida:*

The answer to your question is provided by Ch. 145, F.S.

It seems clear that the Legislature in enacting §§145.03-145.05, intended them to be construed together in fixing a deadline for the filing of financial reports and turning over excess fees which had accrued to the various county fee offices during the preceding year.

Until such time as the Florida Supreme Court may rule otherwise, it is the duty of county fee officers to pay over all excess fees to the county and to render a complete report and accounting of said fees on or before December 31 of each year.

In order, however, to avoid hardship or practical difficulties which might confront fee officers in making a final report and payment on December 31, a grace period of 15 days is allowed (§145.04) to fee officers in completing this duty. Answering your question specifically, therefore, it may be considered that fee officers have until January 15 of each year to make their final report and to pay over all excess fees to the county, before being subject to the penalties provided by §145.04, F.S.

April 6, 1951—051-85.

CIRCUIT COURT CLERKS—FEES—COMPUTATION— RECORDS

QUESTIONS: 1. To what annual compensation is a clerk of the circuit court, who serves 18 days less than one year, entitled, when the fees and commissions legally accruing to the clerk during such period exceed the statutory annual maximum of \$7,500?

2. May an outgoing clerk retain as personal property deposit books and check books kept by him as an office account, in view of the fact that such records are not required to be kept by statute?

To: *Honorable Raymond D. Ford, Former Clerk Circuit Court, St. Lucie County, Ft. Pierce, Florida:*

The answer to your first question is substantially contained in two prior opinions of this office rendered by my predecessors in office, with which I concur. These opinions are dated June 9, 1937 and May 30, 1947, and are contained in the 1937-38 Biennial Report, page 106, and the 1947-48 Biennial Report, page 155, copies of which are enclosed.

These opinions, as applied to your question, hold, in brief, that it is the office that earns the fee as distinguished from the occupant of the office, and that the total compensation to the office for the year should be the same, whether received by one officer or divided among several. Accordingly, on the basis of these prior opinions and the authorities cited therein, it appears that your compensation as clerk of the circuit court for a period of 18 days less than one year should be calculated by determining the fraction of the calendar year which you held office (dividing the number of days served by the total number of days in the year) and applying this, in the instant case, to the \$7,500 statutory maximum compensation allowed. In other words, your compensation would be $347/365$ of \$7,500, and your first question is answered accordingly.

Your second question has to do with an interpretation of §839.14, F.S., which provides, in effect, that a public officer must deliver "records, papers, documents or other writings appertaining and belonging to" the office to his successor. You ask whether deposit books and check books kept in your name as an office account are required to be delivered to your successor, in view of the fact that such records are not required to be kept by statute.

The fact that such records are not specifically required by statute does not necessarily make them any the less "records appertaining and belonging to" the office. They are, in my opinion, records of the office and would fall within the commonly accepted definitions of public records laid down by the courts. A public record has been defined as "a written memorial made by a public officer authorized by law to make it. It is required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law." (*Amos vs. Gunn*, 84 Fla. 285, 94 So. 615). You will note that the term "public record" encompasses, by virtue of this definition, not only those records required by law to be kept but also those *necessary* to be kept in the discharge of the legal duties of the office. It has also been held that "whenever a written record of transactions of a public officer in his office is a convenient and appropriate mode of discharging duties of office, and is kept by him as such, whether required by express provision of law or not, such a record is a public record." (*State v. Evert*, 219 N.W. 817, 52 S. D. 619). Therefore, it seems to me that deposit books and check books kept as an office account in the office of a clerk of the circuit court are within these definitions of public records, and are certainly records or other writings appertaining and belonging to the office. Hence, they should be delivered to your successor in office as required by §839.14, F.S. I can see no purpose for withholding such records, and can visualize many situations where such records would be essential to your successor in office, for reference or audit purposes, etc. Accordingly, in my opinion, your second question should be answered in the negative.

March 17, 1952—052-87.

COUNTY PROSECUTING ATTORNEY—COMPENSATION —REPORT

QUESTION: Is the Prosecuting Attorney for the County Judge's Court of Leon County, Florida, required to make and file with the Board of County Commissioners of Leon County a report

of all fees or commissions collected by him, as provided by §145.03, F. S., pertaining to county officials?

To: Honorable George C. Crawford, Clerk, Circuit Court, Leon County, Tallahassee, Florida:

The office of Prosecuting Attorney for the County Judge's Court of Leon County was created by Ch. 14828, Laws of 1931, which chapter prescribes the duties of the office and provides for compensation. The authority of the legislature to create such an elective office and fix the compensation therefor has been approved by the Supreme Court (*State ex rel. Lewis v. Garrett*, 130 Fla. 414, 178 So. 309). It is to be noted that Ch. 14828, Laws of 1931, provides that the Prosecuting Attorney for the County Judge's Court of Leon County, shall receive as compensation a salary of \$300 per annum, payable monthly "and in addition thereto said attorney shall receive a fee of \$5.00 for all convictions and pleas of guilty had before said County Judge's Court. Said conviction fees to be taxed as part of the costs in each case. Said conviction fees shall be payable out of the fine and forfeiture fund of the county." (§4)

It is apparent, therefore, that the statute created the office and provided that a considerable portion of the compensation of the office should be derived from fees. Section 145.01, F. S., provides for the compensation and report of county officials who are paid by fees or commissions.

There is nothing in Ch. 14828, Laws of 1931, indicating a legislative intent to exempt the Prosecuting Attorney of the County Judge's Court of Leon County, from any responsibility, duty or obligation imposed by general law upon all other state and county officials.

It is therefore my opinion that §145.03, F. S., is applicable to the office of Prosecuting Attorney of the County Judge's Court of Leon County. It is also my opinion that §145.01, F. S., which fixes the net income allowable to state and county officials paid by fees or commissions, is also applicable to said office.

It should not be overlooked that §145.02, F. S., is equally applicable to the office of Prosecuting Attorney of the County Judge's Court of Leon County.

August 9, 1951—051-266.

SUPERINTENDENT PUBLIC INSTRUCTION— COMPENSATION

QUESTION: Under Ch. 26795, Laws of 1951, a sliding scale of compensation is fixed for the County Superintendent of Public Instruction in certain counties, with the limitation that such compensation shall not exceed that compensation paid to the *highest paid other county official of the county*, what other county officials did the Legislature intend to include in this limitation?

To: Board Public Instruction, Escambia County, Pensacola, Florida:

Every county in the State has a sheriff, a clerk of the Circuit Court, a county judge, a tax assessor, a tax collector, and certain other regular county officials common to all the counties. In addition to such regular county officials the Legislature has cre-

ated certain officials for specific counties, and the constitution has provided for others such as the judge, county solicitor and clerk for criminal courts of record in certain counties; the judge, county solicitor and clerk for the court of record in and for Escambia county; the circuit judge for Duval county. These last named officials are probably county officers within the general meaning of the term.

In every county to which Ch. 26795 applies, there is a sheriff, clerk of the circuit court, county judge, tax assessor, tax collector, and other officers found in every county. Only a very few of the counties within the purview of the said act have criminal courts of record, and only one of them has a court of record such as the one in Escambia county and only one has a circuit judge especially provided for in the constitution but paid by the county. Escambia and Orange counties have special courts provided for under the State Constitution, but Volusia county (a county of the same approximate size) has no such court. It is doubted that the Legislature intended that the County Superintendent in such counties be paid under different limitations. The judge of the court of record in Escambia county probably draws a greater amount of compensation than do any of the county officers in Orange, Palm Beach or Volusia counties, which have comparable populations.

We, therefore, feel that the Legislature, by reference to the "other highest paid county official in his county," intended to refer to the regular county officials found in each of the several counties and not to such officers as above mentioned found in only a few of the several counties within the purview of the said enactment. This seems to answer the above question.

May 1, 1952—052-143.

CIRCUIT COURT CLERKS—OFFICE EQUIPMENT AND SUPPLIES

QUESTIONS: 1. What office supplies and equipment, necessary for the operation of the office of clerk of a court in a county whose compensation is derived from fees, are required by law to be furnished by the county and by the officer respectively?

2. Is a small claims court established in a county entitled to the same supplies and equipment as are other courts within the first question?

To: *Honorable Harry A. Johnston, County Attorney, West Palm Beach, Florida:*

This opinion deals mainly with clerks of courts of record, such as clerks of the circuit courts, clerks of the criminal courts of record, clerks of the civil courts of record, clerks of courts of record, clerks of county courts, and clerks of other courts established in a county. Although some county judges have clerks, others do not. Justices of the peace, not being courts of record, do not usually have clerks.

County officers, when making return of the incomes of their offices for the purpose of determining their official incomes, are permitted to deduct "the necessary expenditures for the proper operation" of their offices (\$145.02, F. S.); and the board of county commissioners, from the excess fees paid over by county officers,

are permitted to purchase and furnish the respective offices "with the necessary books, furniture, fixtures, and *all other things now supplied by the boards of county commissioners and paid for by them from the general revenue of the county*" (§145.05, Florida Statutes). The "net income" of a county office means the "residue of the income of such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the operation of said office." (§145.02.)

This same question, or some part or phrase of it, was considered by this office in the opinions reported in the following Biennial Reports of the Attorney General: 1929-30 B. R. 329; 1931-2 B. R. 703; 1933-4 B. R. 208; 1939-40 B. R. 53 and 56; 1943-4 B. R. 177; 1947-8 B. R. 159 and 1949-50 B. R. 230; from which opinions it appears that office expenses are divided into two classes—capital equipment (sometimes referred to as substantial items of equipment) and current operating expenses. In 1939-40 B. R. 56 it was stated "that county fee officers may not purchase substantial items of equipment as necessary expenditures for the proper operation of their offices, but that they may pay only necessary current operating expenses." In 1939-40 B. R. 53, it was held that a telephone was a substantial item of equipment, so that the rental on the phone should be paid by the county; however, it was further held that long distance and other toll charges were current operating expenses. Typewriter ribbons have been held to be both substantial items of expense (1943-4 B. R. 177) and items of current expense (1933-4 B. R. 208). Stationery, blanks and forms, which an officer is required to use, have also been held to be substantial items of expense to be paid for by the county (1933-4 B. R. 208). The several attorneys general considering the question have agreed that capital investments or substantial items of equipment should be paid for by the county and that the current expenses should be paid for by the officer; however, there has been some difference of opinion as to classifications. Post office boxes would also seem to be substantial items of equipment to be paid for by the county. The question is considered generally in 20 C. J. S. 1054, §208. See also Sparkman v. County Budget Commission, 103 Fla. 242, 137 So. 809.

Pencils, ink and similar items would seem to be current office expenses to be paid for by the officer and not the county. The last expression of this office is that typewriter ribbons are to be paid for by the county. Where receipts are required and stubs or copies are required to be kept as a record then we feel that such receipt books should be paid for by the county; but where kept by the clerk for his own purposes and not for a public record we feel that they are current expenses of the office. The county commissioners would seem to have some discretion in determining what are and what are not capital investment or substantial items of expense and what are and what are not current office expenses.

Where a small claims court is set up either under Ch. 26920, Laws of 1951 (Ch. 42, F. S.) or by special act of the Legislature, the question of whether it is or is not a court of record might be material, at least as to what records and record books are to be furnished by the county. Under §42.08, F. S., small claims courts, established under Ch. 42, F. S., are required to keep "minutes of all proceedings," as well as other records, which would seem to

make them courts of record. Whether small claims courts set up by special legislation are courts of record or not may be ascertained only by an examination of such acts. Where they are courts of record they would seem to be controlled by the same rules as are applied to other courts of record.

These observations seem to answer the above question as well as it may be answered in general terms.

July 2, 1951—051-187.

TAX ASSESSORS—NEWSPAPERS OWNED BY COUNTY COMMISSION MEMBER—PURCHASES

QUESTION: Where a member of the board of county commissioners runs a newspaper, would it be illegal if the tax assessor gave this newspaper an order for printed matter, said order to amount to less than \$300.00?

To: *Honorable C. M. Gay, State Comptroller:*

Your question requires consideration of §§200.41 and 145.05, F.S.

Section 839.09, F.S., in effect prohibits county commissioners from making purchases out of public funds from themselves. The question here presented seems to be primarily whether or not supplies purchased for or by a tax assessor come within the meaning of §839.09.

I understand that the practice which is followed at present in this regard has been for the county commissioners to purchase and supply the tax assessor with necessary supplies and equipment in those counties wherein are no excess fees in the tax assessor's office. In such instances, I believe that §839.09 would clearly prohibit the purchase contemplated in your question.

In counties wherein the tax assessor's office earns an excess of fees, the practice seems to be for the tax assessor to make his own purchases out of said fees, said purchases having been set up in an operating budget formulated by the tax assessor himself and approved by the comptroller as provided in §200.41, F.S.

Under the latter system there is no express statutory prohibition against making purchases for the tax assessor's office from a member of the board of county commissioners, since the county commissioners do not have the final authority in approving the tax assessor's budget from which the purchases are made.

As stated above, however, the board of county commissioners, by implication from the language used in §200.41, has at least some control or power of review over the tax assessor's budget in its formative stage and this authority, although vague as far as the statute is concerned, may be sufficient to give the county commissioners such authority over purchases of supplies and equipment for the tax assessor's office as to bring said purchases within the scope of §839.09, F.S.

I believe your question may best be answered as follows: Assuming that your question contemplates a county in which the tax assessor makes his own budget for approval by the comptroller and that all purchases of supplies and equipment for his office are made directly by the tax assessor himself, there is no specific statutory

prohibition against the making of purchases by the tax assessor from a member of the board of county commissioners.

This opinion does not attempt, however, to discuss the wisdom of such procedure or its relative merits from the standpoint of public policy.

July 18, 1951—051-223.

COUNTY FEE OFFICERS—EXCESS FEES—AIR CONDITIONING EQUIPMENT—BIDS

QUESTION: In view of §145.05, Florida Statutes, may a county fee officer purchase air conditioning equipment for his office out of excess fees?

To: *Honorable Jess Mathas, Clerk Circuit Court, DeLand, Volusia County, Florida:*

Section 145.05, F.S., requires the payment of all excess fees into a "special fund" created by the board of county commissioners. It limits expenditure of the monies *by the board* to "equipping, maintaining and supplying" the office concerned "with the necessary books, furniture, fixtures and all other things now supplied * * * by the board * * *." Air conditioning will undoubtedly add to the comfort and efficiency of the office and I believe the language is sufficiently broad to permit its purchase by the board of county commissioners for use by the county officer. The purchase of the equipment, of course, should be made only after calling for and receiving bids in conformity with existing law.

COUNTY TRAFFIC OFFICERS

May 21, 1951—051-129.

COUNTY TRAFFIC OFFICERS—EMPLOYMENT—COMPENSATION

QUESTION: "Does the Board of County Commissioners of Polk County, Florida, under Ch. 146, F.S., have authority to employ and pay traffic officers for Polk County?"

To: *Honorable Kirby W. Blain, Deputy Clerk, Bartow, Polk County, Florida:*

The procedure set forth in §146.01, F.S., provides for the appointment or dismissal of county traffic officers by the sheriff upon recommendation of the county commissioners. Provision for compensation of county traffic officers by the county commissioners is provided in §146.02, F.S. Although a number of counties have special acts authorizing county traffic officers, I am of the opinion that the creation of such officers is authorized in any county by the above cited general law. It would also appear that Polk County is now in the population bracket provided in several other acts. See Ch. 18396, Laws of 1937; Ch. 20625, Laws of 1941; Ch. 20999, Laws of 1941 pertaining to county traffic officers.

Your question is answered in the affirmative in accord with the above cited statutes.

COUNTY PUBLIC HEALTH UNITS

November 7, 1952—052-309.

COUNTY EMPLOYEES—DUAL JOBS—COUNTY FUNDS—DEPOSITORIES

QUESTIONS: 1. May an employee of the county health unit

be employed by the board of county commissioners to serve as a plumbing inspector?

2. May the director of the county health department be delegated the responsibility of handling the receipt of plumbing inspection fees, deposit them into a local bank account under the name of the county health department plumbing account and periodically transfer from this bank account all inspection fees collected to the State Treasury for credit to the county health unit fund maintained in the State Treasurer's office?

To: Honorable Fred B. Ragland, Director, Bureau of Finance and Accounts, Florida State Board of Health, Jacksonville, Florida:

Section 15, Art. 16, of the Florida Constitution provides, in part, as follows:

"... and no person shall hold or perform the functions of more than one office under the government of this state at the same time."

The Florida Supreme Court in many cases in interpreting this constitutional provision has ruled that a person may not hold two state offices when such offices require the performance of the duties of the sovereign powers of the State of Florida. A county official is considered a state official. However, in the present situation Mr. B. G. Tennant's position as employee of the county health unit and as plumbing inspector for Escambia County here involved are ones of employment as distinguished from public office, and such constitutional provision is not applicable.

There is no constitutional or statutory provision in Florida prohibiting employment of a person by more than one state or county agency. It is only a matter of public policy to be determined by the County Commissioners of Escambia County as to whether a person may be employed in two county jobs. Therefore, your first question is answered in the affirmative.

Section 553.07, F.S., provides in part as follows:

"... all such fees collected under this chapter shall be deposited with the plumbing inspector of the county to the account of the county treasurer and shall be used for the inspection of plumbing and the enforcement of this chapter in such county."

The responsibility of collecting the fees authorized by the plumbing control for the inspection of plumbing within the county is on Mr. B. G. Tennant in his capacity as county plumbing inspector. The above quoted portion of §553.07, F.S., provides that such fees be deposited to the account of the county treasurer. Prior to the year 1914, the office of county treasurer was a constitutional office under §6, Art. 8 of the Florida Constitution. In that year the office was abolished by a constitutional amendment.

Section 6, Art. 8 of the Florida Constitution as amended presently reads in part as follows:

"... The Legislature shall provide by law for the care and custody of all county funds and shall provide the method of reporting and paying out all such funds."

In fulfilling this constitutional mandate the Legislature has enacted Ch. 136, F.S., providing depositories for county funds. Section 136.01 provides:

"Banks to be county depositories.—Any bank, national or state, authorized to do business in this state which will, as to the various funds hereinafter referred to, offer satisfactory inducement as to security and which will furnish, at its own expense, a surety bond issued by some surety company duly authorized to do business in this state, or make satisfactory deposit to the credit of the county of sufficient United States bonds, bonds the payment of whose principal and interest is guaranteed by the United States, federal certificates of indebtedness, state, county, or municipal bonds, for the safekeeping and prompt payment of such funds, is hereby created and designated a county depository for the funds for which such security shall be furnished and may receive such public funds in the manner and method hereinafter provided. The funds hereinabove referred to shall include: County general revenue funds, county fine and forfeiture funds, county road funds, and each and every other separate and distinct county fund, respectively; the enumeration of said funds being herein made, not by way of limitation, but of illustration, and it being the intent hereof that all funds of such county or of any district or subdivision thereof, shall be included."

Section 136.03 provides, in part, as follows:

"Tax collectors and all other persons having, receiving or collecting any money payable to the county funds not otherwise provided for, shall pay the same to the bank or banks qualified to receive the same . . ."

Through inadvertent error on the part of the Legislature as expressed in §553.07, F.S., it would be impossible to deposit the inspection fees authorized to be collected under the plumbing control law in the county treasurer as that office is nonexistent under present Florida law.

The fees in question, therefore, must be deposited in depositories authorized for other county funds under Ch. 136, F.S. By the provisions of §136.03, Mr. B. G. Tennant should deposit such fees in a bank authorized under §136.01 to receive other county funds of Escambia County. The plumbing inspection fees deposited in said bank would be subject to audit by the county auditor, state auditor, and state comptroller as provided for in §136.08, F.S. The law adequately provides for the deposit of such plumbing inspection fees in the county where such are collected and, therefore, the director of the county health department may not be delegated the responsibility of handling the receipts of such fees to be forwarded to the state treasurer for credit to the county health unit maintained in the state treasurer's office. Your second question is therefore answered in the negative.

CHAPTER XII

CITIES AND TOWNS

GENERAL POWERS OF MUNICIPALITIES

March 20, 1952—052-96.

CITY COUNCIL MEMBER—COUNTY COMMISSIONER CANDIDATE—MAY SERVE AS

QUESTION: May a person serve as a member of a City Council and at the same time be a candidate for the office of County Commissioner?

To: *Honorable R. Bruce Meffert, County Commissioner, Marion County, Ocala, Florida:*

Section 15 of Art. 16 of the Florida Constitution provides, among other things, that "no person shall hold, or perform the functions of, more than one office under the government of this State at the same time." However, it seems that a municipal office is not "an office under the government of this State," within this provision. Unless the charter or ordinances of a municipality contain a prohibition, there is apparently no express provision in our law which would prevent a person from holding a County Office and a Municipal Office at the same time. (Attorney General v. Connors, 27 Fla. 329, 9 So. 7).

It is true that under the common law, one person could not hold two offices which were incompatible. This rule derived from principles of public policy and its propriety is obvious. (42 Am. Jur. 926, §59; 46 C. J. 941-943, §46). Even so, I am unable to ascertain any incompatibility between the offices of City Councilman and County Commissioner.

Still further, the prohibition at common law seems only to be against *holding* two incompatible offices, therefore it appears that there is no prohibition against holding one office and campaigning for another with intent to resign the office held, if the office campaigned for is obtained.

It is therefore my opinion, qualified by any charter or ordinance provisions of the municipality, that the question should be answered in the affirmative.

March 20, 1952—052-97.

REAL ESTATE BROKER—LICENSE TAXES

QUESTION: A real estate broker, having his place of business in, and duly licensed by, the City of New Smyrna Beach, also advertises and shows properties to prospective purchasers within the City of Edgewater. Upon sale, the closing thereof is completed within his office in the City of New Smyrna Beach. Under these

circumstances, may the City of Edgewater require an occupational license tax of such broker?

To: Honorable John E. Chisholm, City Attorney, City of Edgewater and New Smyrna Beach, Florida:

You have directed our attention to a provision of the charter of the City of Edgewater which grants power to that municipality to impose a license tax upon businesses and occupations carried on in part within the municipality.

While the facts are quite dissimilar, the case of *Duffin v. Tucker*, 113 Florida, 621, 153 So. 298, sets out certain principles of law which seem to be applicable to the question under consideration. Particular attention is called to the special concurring opinion by Chief Justice Davis appearing on page 300, to the effect that the taxing power of a state or city is not a power that can be extraterritorially exercised directly or indirectly, and that the power to place a tax upon commerce and trade between two cities is "one which must be exercised by the state alone, since only the state has the territorial jurisdiction to sustain that kind of a tax." The court then on rehearing by per curiam opinion, referring to the powers granted to the City of Cocoa, said:

"The city of Cocoa is not authorized, and we seriously doubt that it could be authorized by legislative enactment, to levy a tax on a business or occupation transacted or performed in some other municipality."

The later case of *Farris et al v. Hall*, 115 Florida 433, 156 So. 114, affirmed the principles of the *Tucker* case, *supra*, pointing out that a municipality may not require a license tax against mere salesmen who simply take orders to be afterwards delivered to customers, after the orders are accepted beyond the corporate limits and "properly licensed where they maintain their principal places of business to do the business they carry on."

The facts you have presented make a very close case, but I seriously doubt that a license tax may be required of the broker under the circumstances. This should not be construed to mean that under other conditions the City might not properly require the occupational license tax.

May 3, 1951—051-101.

ITINERANT PHOTOGRAPHERS—LICENSE TAXES— ORDINANCE

QUESTIONS: 1. Does a municipality have power to enact an ordinance providing that itinerant photographers, engaged in interstate commerce, shall pay an occupational license tax, where there is no such tax placed upon resident or local photographers?

2. If the answer to Question 1 is in the negative, may a municipality levy an occupational license tax against an itinerant photographer engaged in interstate commerce in the same amount as that imposed upon a local or resident photographer?

To: Honorable J. C. Rogers, City Attorney, Lakeland, Florida:

QUESTION ONE

The answer is dependent upon whether or not the ordinance is

violative of Art. 1, §8, Clause 3 of the Constitution of the United States, which is commonly known as the "commerce clause." You have stated that the facts are to be considered identical with those appearing in *Olan Mills, Inc. of Alabama vs. City of Tallahassee*, (Fla.) 43 So. 2d 521. In that case it was determined that the appellant was engaged in interstate commerce. It was conceded that interstate commerce is "subject to reasonable regulation under the police power and must pay its fair share of the tax." A city ordinance was declared invalid which imposed an annual license tax of \$25.00 upon local photographers and \$50.00 per week on transient photographers. The Court cites *Nippert vs. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760, 162 A.L.R. 844, in which this principle is clearly enunciated, but in neither case is there amplification of the type of tax which may be imposed. The cases of *Graves vs. City of Gainesville*, 78 Ga. App. 186, 51 S. E. 2d 58, and *Warren Kay Vantine Studio, Inc., vs. City of Portsmouth*, 95 N. H. 171, 59 Atl. 2d 475, were also discussed. In the New Hampshire case, a municipal occupational license tax of one hundred dollars a month was placed upon itinerant photographers, but none required of local commercial photographers. The ordinance was declared invalid because of being discriminatory and an undue burden on interstate commerce. In the Georgia case, the difference in the license required of a resident photographer as contrasted with that of an itinerant photographer was such as to make it discriminatory and was also held invalid by reason of being a burden upon interstate commerce. Where a license tax is required of an itinerant photographer and not of a local photographer it is clearly discriminatory, placing an undue burden on interstate commerce. This answers the question.

QUESTION TWO

Olan Mills, Inc., vs. City of Tallahassee, supra, as well as *Nippert vs. Richmond*, supra, recognize the right of a municipality under its police power, even though the transaction is one in interstate commerce to levy taxes upon certain classes of itinerant solicitors. However, the *Nippert* case, supra, points out that in determining whether a given license imposes an undue burden upon interstate commerce, it is proper to consider that it is proposed by a municipality rather than a state, therefore, potentially imposing a multiple, rather than a single burden. As was stated in the *Nippert* case, the crux of the problem is whether the municipality puts the interstate commerce upon an equal plane with local trade and not of "whether interstate trade shall bear its fair share of the costs of local government, the benefit and protection of which it enjoys on a par with local business." Then follows the statement that it has not been decided that a "local incident" may be made the "focus of the tax."

The *Nippert* case, supra, discusses at length *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, which held an ordinance of the City of New York valid placing a sales tax upon certain transactions and services. The *Berwind-White* case mentions several situations where the taxing thereof has been declared valid, such as, ad valorem taxes on goods shipped in interstate commerce before movement and after arrival; an excise tax for warehousing of goods prior to its interstate ship-

ment or use; an occupational license tax on a local business which is separate and distinct from the transportation which is interstate commerce. In the Nippert case, the ordinance of the City of Richmond was held invalid, which placed the identical tax upon local solicitors as distinguished from itinerant or non-resident solicitors for the reason that it discriminated against interstate commerce in favor of local competing business. The distinction was made that the tax in the Nippert case bore no relationship to the volume of business done, as it did in the Berwind-White case, and the tax fell upon completed transactions not upon the initial move of doing business. The point was stressed in the Nippert case that the small operator, and especially the casual or occasional, that come from out of state would find the tax not only burdensome, but prohibitive "with the result that the commerce is stopped before it is begun."

Since the Olan Mills decision, the City of Tallahassee has modified and re-enacted its ordinance which requires the same license fee of the local as the itinerant photographer. This ordinance has not to this date been attacked.

A careful reading of the authorities has left me in doubt as to whether or not an identical tax may be placed upon a local and an itinerant photographer engaged in interstate commerce. Consequently, I am unable to answer your question, and suggest that the matter is one for judicial determination through an appropriate proceeding.

May 7, 1951—051-106.

HOMESTEAD TAX EXEMPTIONS—EFFECT OF COUNTY'S ACTION

QUESTION: Where an application for homestead tax exemption is duly filed with the county tax assessor, as provided in and by §192.12, et seq., F.S., and approved by the said tax assessor, is the municipal tax assessor bound to follow the action of the county tax assessor in granting the homestead tax exemption?

To: Honorable Charles B. Fulton, West Palm Beach, Florida:

Under §167.72, F.S., "every person entitled to a homestead exemption as provided by Section 7, Article X, of the constitution of the State of Florida, upon filing an application therefor in proper form with the county tax assessor in the county in which the homestead is situated, shall be deemed to have made application for such homestead exemption from the taxation of the municipality in which the homestead is located, and the municipal tax assessor shall treat the said application as if it had been personally filed with him." Provision is made for furnishing the municipal tax assessor with copies of the county application. Section 5, Art. IX, of the state constitution provides for county and municipal taxation "but the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits."

We find nothing in either §167.72 or §192.12, et al., F.S., requiring the municipal taxing officers to follow the county tax assessor in granting homestead tax exemption claims and grant such exemptions to each and every person to whom such exemp-

tions are granted by the county tax assessor; although "city tax assessors, or other officials performing such duties, shall be governed by the provisions of these homestead exemption laws." (§192.18, F.S.). This quoted provision seems to have been intended to apply the same statutes to both the county tax assessor and the municipal tax assessor. They each seem to be left to their separate discretion on passing upon applications for homestead exemption. The fact that the county grants the exemption does not seem to bind the municipal tax assessor; however, we feel that the municipal tax assessor is required to consider each application filed with the county tax assessor and certified by him to the municipal assessor.

We can see where a tax assessor might deny an application for homestead exemption filed within time, but later decide that he was in error and reverse his decision, especially before the tax roll has been equalized. Also the equalization board might reverse him in one he has rejected and grant it. This action probably should be certified to the municipal assessor. The county tax assessor and the municipal tax assessor would be passing upon the same facts and circumstances in most instances; however, they, like two or more courts, might reach a different conclusion as to the application of such circumstances.

We feel that the above question should be answered in the negative.

June 19, 1952—052-192.

MUNICIPALITY—ORDINANCE—SOLICITORS PRIVATE PREMISES

QUESTION: May a Florida municipality enact an ordinance making it a punishable offense for persons soliciting orders for the sale of merchandise to be in and upon private premises within a city when not requested or invited so to do by the owner or the occupant?

To: Honorable Thomas H. Anderson, Attorney at Law, Miami, Florida:

You have referred to the case of *Prior vs. White*, 132 Fla. 1, 180 So. 347 in which the Supreme Court was considering the validity of an ordinance of the City of New Smyrna declaring that the practice of being upon private premises by solicitors, peddlers, itinerant merchants and transient vendors of merchandise not having been requested or invited so to do by the owner or occupant of the premises, a nuisance and punishable as a misdemeanor. The ordinance was declared unreasonable and the petitioner in habeas corpus was released from custody.

Prior vs. White, supra, was decided in the year 1938. The Supreme Court of the United States, in 1951, decided *Beard vs. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, having before it, except for an inconsequential difference in language, the same ordinance as was considered in *Prior vs. White*. The majority opinion written by Mr. Justice Reed considered the Alexandria ordinance with a view of determining whether or not it

violated any of the following provisions of the Constitution of the United States: Section 1 of the 14th Amendment; the Commerce Clause; and finally, the first amendment as made applicable to states by the 14th Amendment, and held it valid.

In *Prior vs. White*, supra, Judge Brown, who wrote the opinion, pointed out that the contentions were that the ordinance was contrary to §§1, 4 and 12 of the Declaration of Rights of the Florida Constitution and §1 of the 14th Amendment to the United States Constitution. The opinion does not point out which constitutional provision the ordinance offends.

In *Prior vs. White*, supra, the Florida Supreme Court held that the soliciting of orders for the sale of goods at private homes is "in fact either no nuisance at all or is at most merely a private nuisance" and, therefore, not punishable as a crime. This finding by the Florida Supreme Court was not overruled by the United States Supreme Court in *Breard vs. Alexandria*, supra, in which case the only question before the Court was whether or not the ordinance in question violated any of the following provisions of the Constitution of the United States: Section 1 of the 14th Amendment; the Commerce Clause; and finally, the 1st Amendment as made applicable to states by the 14th Amendment.

It is impossible for me to speculate what effect *Breard vs. Alexandria*, supra, may have upon the Supreme Court of Florida, in the event the same proposition of law as was presented in *Prior vs. White*, supra, is reconsidered by that court. However, until such time as *Prior vs. White*, supra, is overruled, it appears that a Florida municipality may not enact an ordinance which makes it a punishable offense for a person soliciting orders for the sale of merchandise to be in and upon private premises in a city, when not requested or invited so to do by the owner or the occupant.

POLICE POWER OF MUNICIPALITIES

June 26, 1952—052-202.

ARRESTS—NON RESIDENTS—MOTOR VEHICLES INSPECTION

QUESTIONS: 1. Has any municipality in Dade County the power and authority to require inspection of automobiles owned and operated by persons living outside the particular municipality and having no place of business in such municipality?

2. Can any municipality in Dade County give recognition to inspection of automobiles made by other municipalities and to inspection stickers placed thereon by such other municipalities?

3. Can any municipality in Dade County cause the arrest of a motorist who lives outside such municipality and has no place of business therein for driving on the streets of such municipality with an inspection sticker on his automobile which has been issued by another municipality and which has expired?

To: *Honorable Park H. Campbell, County Attorney, Miami, Dade County, Florida:*

The regulation of traffic on public streets or highways is the

exercise of sovereign police power. Municipalities acquire this right to exercise sovereign police powers by statutes and it is certainly elementary that the State Legislature may delegate to, or withhold from, municipalities the exercise of such sovereign power as it may deem wise and expedient. That is to say, it is within the province of the State Legislature to enact statutes granting to municipalities the authority to pass ordinances requiring annual inspection of automobiles operating within such municipality.

In the case of *City of Miami vs. Slone*, 139 Fla. 91, 190 So. 810, the respondent was arrested and taken into custody by the City of Miami for, among other things, refusing to submit his motor vehicle to the City for inspection as required by City ordinance. He was tried, convicted, and sentenced. On appeal to the circuit court, judgment was reversed. On review by certiorari the Supreme Court said:

"The Circuit Court predicated his judgment of reversal on the fact that respondent was a nonresident of the City of Miami, and being so, the City had no jurisdiction to require him to secure a driver's license or to submit his motor vehicle to the City for inspection.

(1) This would doubtless be true by the terms of the ordinance as to a casual passer through the City but it does not hold good as to respondent who lives in the vicinity of the City and uses its streets frequently by traversing them with his motor vehicle. The ordinance allows nonresident owners thirty days within which to comply with its terms.

(2) The provision of the ordinance requiring owners of motor vehicles to submit them to the City for inspection was a reasonable requirement in the interest of public safety. *Cyclopedia of Automobile Law and Practice*, Volume I, Section 567; *State ex rel Stephenson v. Dillon*, 82 Fla. 276, 89 So. 558, 22 A.L.R. 227.

(3) Likewise the State or a municipality duly authorized may in the interest of public safety and the general welfare, when no undue burden is imposed on interstate commerce, require nonresident users of motor vehicles to secure a driver's license. *Hendrick v. Maryland*, 235 U.S. 610, 35 S. Ct. 140, 59 L. Ed. 385; *Kane v. State of New Jersey*, 242 U.S. 160, 37 S. Ct. 30, 61 L. Ed. 222; *State v. Perry*, 138 S. C. 329, 136 S. E. 314; *Harper v. England*, 124 Fla. 296, 168 So. 403; *State v. Denson*, 189 N. C. 173, 126 S. E. 517; *Cyclopedia of Automobile Law and Practice*, Volume I, Section 572.

The circuit court was therefore in error so his judgment is quashed."

It is apparent from the foregoing that a municipality in this state has the authority and power to require inspection of automobiles owned and operated by persons living in as well as outside its municipal limits. I know of no statute which has been

passed in this state since the Supreme Court rendered its opinion in the Slone case, that would revoke or nullify the rights of municipalities in this particular respect. In this connection see also *State ex rel Nelson v. Quigg*, 143 Fla. 227, 196 So. 417, 147 A. L. R. 533.

I cannot readily perceive that a municipality which has the power and authority to require inspection of automobiles owned and operated by persons living outside the particular municipality, that would not also have the authority by proper ordinance provision to recognize similar inspections performed by other municipalities. On the other hand, I am of the opinion that there is no law which required or compels a municipality to give recognition or full faith and credit to automobile inspections made by other municipalities, and I believe this is true whether the inspection sticker given at the time the automobile is inspected by the other municipality is still current or not.

It is therefore my opinion that all three questions should be answered in the affirmative.

October 24, 1951—051-374.

MUNICIPAL COURTS—NONRESIDENT COUNTY— ARRESTS—WARRANTS

QUESTION: What is the correct legal procedure for serving a warrant of arrest issued out of the Municipal Court of the City of Ft. Lauderdale on a person living in another county charged with committing a misdemeanor in the City of Ft. Lauderdale?

To: Mr. Roland R. Kelley, Chief of Police, City of Ft. Lauderdale, Florida:

The charter powers of the City of Ft. Lauderdale are derived from Ch. 24514, Laws of 1947, and Art. 2, Part VI, deals with the establishment, powers and functions of the Municipal Court.

It will be seen from Art. 2, Part VI, §§2 and 6, that no attempt was made by the Legislature to define the territorial limits within which the process of the Municipal Court of the City of Ft. Lauderdale should extend or where it could be served.

Section 168.03, F. S., dealing with the general police powers of municipalities, provides that:

"The process of the mayor's court, or other municipal courts, of the cities and towns within the State of Florida shall extend to and may be served anywhere within the territorial limits of the county in which said city, or town, is located, and all summons, subpoenas, warrants and other process of the mayor's court, or other municipal courts, may be served and executed by the city, or town marshal, his deputies, or other executive officer of such court, anywhere within the territorial limits of the county within which the court issuing the same is located."

It will be seen from the above provision of general law that, absent specific charter authority, the process of municipal courts

of the cities and towns of the State of Florida does not extend beyond the territorial limits of the county in which said city or town is located.

It should be borne in mind that a municipal court has no authority or jurisdiction to try offenses against state law, as such, whether the same be a felony or misdemeanor unless the same act is, by proper ordinance, made an offense against the municipality. Constitution of Florida, Art. V, §34; *Orr v. Quigg*, 135 Fla. 653, 185 So. 726.

It is, therefore, my opinion that the process of the Municipal Court of the City of Fort Lauderdale cannot be legally served outside the territorial limits of Broward County, and it is further my opinion that the Municipal Court of Ft. Lauderdale is without authority in law to issue warrants of arrest or other process running throughout the State of Florida or to try misdemeanors based only on the violation of state law.

CONTRACTION AND EXTENSION OF MUNICIPAL TERRITORIAL LIMITS; CONSOLIDATION OF TAXING DISTRICTS

July 23, 1951—051-234.

MUNICIPALITIES—CONSOLIDATION—TAXES— BACK ASSESSMENT

QUESTIONS: 1. Where two existing municipalities are consolidated by the Legislature under the charter of one of the said municipalities, so that after the merger the charter of one of them ceases to exist, will the resulting consolidated corporation be entitled to collect the delinquent taxes of the one whose charter was repealed?

2. Would the consolidated corporation be entitled to back assess lands within the one whose charter was repealed as aforesaid for omitted years prior to the year of merger?

To: Honorable Thomas J. Shave, Jr., City Attorney, Fernandina, Florida:

It appears from your request for opinion and from the public records that the Town of Fernandina Beach (which the 1951 act purports to consolidate with the City of Fernandina) exists under the general corporate statutes (the consolidation act was in error when it recited that the town existed under Ch. 25826, Laws of 1949, as such act was never approved by the voters); however, the legality of its corporate existence is now in litigation, which at this time remains undisposed of.

Chapter 27543, Laws of 1951, purports to consolidate the Town of Fernandina Beach with the City of Fernandina; however, as the existence of the Town of Fernandina is in undisposed of litigation, we are unable to say that there was ever any Town of Fernandina to be merged with the City of Fernandina. Even admitting for the purposes of this opinion that the 1951 act had the effect of incorporating the areas of both Fernandina and Fernandina Beach into a single municipal corporation, the rights of the City of Fer-

nandina to collect existing delinquent taxes, and to levy back assessments against omitted properties, as to lands within the said Town of Fernandina Beach must depend upon the existence of the said town. If the town never had legal existence, then the taxes assessed would have been without authority and the delinquent taxes void.

The answer to the first question, therefore, depends upon the outcome of the litigation above mentioned. Under §2, Ch. 27453, Laws of 1951, the City of Fernandina acquired the "uncollected taxes" of the Town of Fernandina Beach, *if the town had legal existence*. This answers the first question as near as may be.

Assuming that the Town of Fernandina Beach had legal existence, it appears that whenever the Town of Fernandina Beach, within the last three years, failed to assess taxes against a particular parcel of land that the consolidated municipality, which succeeded to the rights of the Town of Fernandina Beach, would likewise have the right to make back assessments to the same extent that the said town could have made had it not been consolidated with the existing municipality. This is especially true as to debt service taxes heretofore incurred by the said town. This is true because nothing in the act of consolidation may defeat the constitutional right of the creditors of the said Town of Fernandina Beach. This answers the second question as well as it may now be answered.

FIREMEN'S RELIEF AND PENSION FUND

June 19, 1951—051-169.

FIREMEN—TERMINATION OF EMPLOYMENT—REFUNDS

QUESTION: Where a person employed as a fireman by a municipality which maintains a Firemen's Relief and Pension Fund, as contemplated by Ch. 175, F.S., terminates such employment, properly may the trustees of such fund pay or refund to him an amount equal to the two per cent of his salary withheld and paid into such fund during the period of said employment?

To: Honorable Russell O. Morrow, Attorney at Law, West Palm Beach, Florida:

It is assumed that the municipality here involved, in its maintenance of a Firemen's Relief and Pension Fund, is governed entirely by the provisions of Ch. 175, F.S., unchanged by any possible special legislation applicable to that municipality. This opinion is conditioned upon such assumption.

Chapter 175 provides for the establishment, maintenance and operation of a firemen's relief and pension fund for various incorporated cities and towns in Florida as described in said chapter. The fund is created and maintained from the several sources of revenue set forth in §175.04, among which (175.04 (2)) is the provision that "two per cent of the salary of each fireman duly appointed and enrolled as members of such fire departments" shall be deducted by the municipality and paid over to the board of trustees of the fund, *"and no fireman or volunteer fireman shall have any right to said money so paid into said fund except as provided in this chapter."*

It is recognized that properly a law setting up a retirement sys-

tem may provide for refund of salary deductions of an employee under the system if he terminates employment prior to the maturing in his favor of retirement benefits under the act. For example, see §121.08, F.S., a part of the state officers and employees retirement system. However, there is no such comparable provision in Ch. 175.

In view of the foregoing, in my opinion the above question is answered as follows:

The question is answered in the negative. That is to say, that the trustees of a firemen's relief and pension fund have no authority to a person terminating his employment as a fireman prior to accrual of benefits under the retirement system the two per cent deducted from such person's salary during the term of his employment.

August 1, 1951—051-251.

FIREMEN'S WIDOWS—PENSION CEILING—REDUCTION

QUESTION: Where under the formula provided in §175.13, F.S., the widow of a fireman is entitled to \$176.00 by way of monthly pension, but §175.19, F.S., places a ceiling of \$100.00 per month on such pension, does the last designated section grant the trustees of the firemen's relief and pension fund, discretionary power to lower the ceiling below the \$100.00 per month, if it should appear that the pension fund may not hereafter be sufficient to pay possible pensioners, but which fund is presently able to meet the obligation?

To: Honorable Sherman N. Smith, Jr., City Attorney, Vero Beach, Florida:

You have stated that the fund now has cash on hand, \$9,099.98, and that the claim mentioned in the question is its only outstanding obligation. While mathematical calculation may indicate serious depletion of available funds, the pensioners are as yet non-existent and therefore future claims are purely speculative. As I read §175.19, until such time as the pension fund "be insufficient to make full payment of the amount of the several pensions," and then only, may the funds be pro-rated "in full satisfaction" of outstanding claims. A reduction in the amount presently due a pensioner cannot be justified upon the theory that lack of funds at some unknown and uncertain time in the future, may result in a pro-ration of monies then available to qualified pensioners.

The question is accordingly answered in the negative.

August 13, 1951—051-271.

INSURANCE—DOMESTIC INSURER—TAX REFUND

QUESTION: The effect of the judgment of the court in the case of *Larson vs. American Title & Insurance Co.*, 52 So. 2d. 816, was to hold that by virtue of Ch. 25344, Laws of 1949, and the proviso concluding §175.05, F.S., domestic companies insuring against loss by fire or tornado were exempt from payment of the one per cent premium receipts tax authorized by said section to be im-

posed by municipal corporations in this state having firemen's relief and pension funds, the exemption effective beginning with the calendar year 1949. Are domestic insurers who paid said tax on or before March 1, 1950, and March 1, 1951, for the respective calendar years of 1949 and 1950, entitled to a refund of such tax so paid?

To: Honorable J. Edwin Larson, Insurance Commissioner:

On February 9, 1950, in opinion 050-69 (A.G.R. 1949-1950, page 10) this office advised the Insurance Commissioner in part and in effect as follows: that domestic insurers engaged in the business of fire and tornado insurance as contemplated by Ch. 25344, Laws of 1949, and as such exempt from the payment of the gross premium receipts tax imposed by §205.43, F. S., to the extent set forth in Ch. 25344, were liable for the payment of the tax for firemen's relief and pension funds which municipalities are authorized to levy under the provisions of §175.05, F. S. A discussion of all the laws involved and the reasons for such conclusion are set forth in such former opinion, copy of which is attached.

One domestic insurer, American Title & Insurance Company, maintained it was not liable for the payment of such tax and filed its bill for declaratory decree in the Circuit Court of Leon County, Florida, seeking construction of the statutes involved concerning said tax and in relation to itself as such domestic insurer. The company, at the time it filed said bill, paid into the registry of said court the amount of said tax if lawfully due. As indicated above, the Supreme Court in that case affirmed the lower court, holding that beginning with the calendar year of 1949, such domestic insurer was exempt from payment of the tax. That decision of the court is dated May 22, 1951. All other domestic insurers exempt under Ch. 25344 from payment of the state excise tax imposed by §205.43, on or before March 1, 1950, and March 1, 1951, paid the tax described in §175.05 for the calendar years of 1949 and 1950. One such insurer has made demand "for refund of \$107.98 which the company paid under Section 175.05, F. S. '49." It is not apparent from the request for opinion if such sum represents total of such tax paid for the two calendar years or if such sum represents the tax paid for one of said years.

This question of refund requires an understanding of the nature of said tax, its collection and distribution.

Those incorporated cities and towns in this state maintaining a firemen's relief and pension fund, as described in §175.05, may levy the one per cent tax provided by said section. Upon adoption of the ordinance imposing the tax, certified copies thereof are deposited with the Comptroller and State Treasurer, and all insurers affected are required to pay the tax levied thereby annually on the following March 1 (§175.06, F. S.). Such tax so imposed is not additional to the state excise tax under §205.43, but the insurer paying the same receives credit therefor on such state tax (§§175.05 and 175.09, F. S.). Taxes collected in pursuance of ordinances enacted under authority of §175.05 are placed in the state treasury in a special fund known as "Municipal Firemen's Pension Fund;" and annually, on March 10, the Comptroller draws warrants against said fund, ("which said sums payable to said

cities or towns are hereby appropriated annually"), payable to the cities and towns entitled thereto, such warrants to be countersigned by the Governor (\$175.07, F. S.).

In the absence of a statute authorizing refund of taxes illegally exacted and voluntarily paid to a public officer, same may not be recovered from the officer by the party paying them. *Johnson vs. Atkins, (Fla.) 32 So. 879; City of Orlando vs. Gill (Fla.) 174 So. 224.* There is no provision in Ch. 175 for refund of this tax or any part thereof paid by these domestic insurers under the circumstances here found. While §205.43 (3), F. S., authorizes refunds of overpayments of the state premium receipts tax imposed by said section, it is not applicable here. Attention is now directed to §215.26, F. S., a law of general application authorizing refunds.

Section 215.26 authorizes the Comptroller to refund moneys paid into the state treasury constituting: (1) An overpayment of any tax, license or account due. (2) A payment where no tax, license or account is due. (3) Any payment made into the state treasury in error. Claim for such refund must be filed with the Comptroller, in the form required by the section, "within one year after the right to such refund shall have accrued." The fact that any such funds paid into the state treasury are to be distributed to local subdivisions of the state does not preclude application of such law. *State ex rel Hardaway Contracting Co. vs. Lee, 21 So. 2d. 211; State ex rel Tampa Electric Co. vs. Gay, 40 So. 2d. 225.*

Under §215.26, it was the legislative intent that refunds should be by Comptroller's warrants on the fund benefited by the original overpayment. *State ex rel Hardaway Contracting Co. vs. Lee, supra.* It is assumed that since distribution of the "Municipal Firemen's Pension Fund" is required to be made by the Comptroller on March 10 each year (\$175.07), the amount which is in such fund at this time is inconsequential. Furthermore, refunds of this tax to domestic insurers should not only be made out of the "Municipal Firemen's Pension Fund," but also out of the amounts distributable to the respective incorporated cities and towns to the extent that they received such tax paid by domestic insurers.

There is no provision of our laws authorizing refund of these taxes illegally paid into the state treasury by application to the State Treasurer. Such claim for refund should be made to the Comptroller in the form and as required by §215.26, F. S.

There are here involved payments of such taxes by domestic insurers on or before March 1, 1950 and March 1, 1951, for the calendar year 1949 and 1950. The right to refund of any such taxes under §215.26 accrued within one year after payment thereof. Hence, assuming that these taxes were paid by domestic insurers as required by law, it would appear that, in pursuance of §215.26, right to refund has been barred with respect to such taxes paid for the calendar year 1949. In any event, as to any such taxes, claim for refund therefor must be filed with the Comptroller within one year from date of payment of same to the state.

With respect to such claims so filed with the Comptroller within one year, in making refunds, he is cautioned to observe the following: (1) such refunds shall be made only from the "Mu-

nicipal Firemen's Pension Fund" in the state treasury when charged to the amounts distributable to the respective incorporated cities and towns from the "Municipal Firemen's Pension Fund" to the extent that the amounts of such taxes so illegally paid by such insurers were distributed to the respective incorporated cities and towns of this state.

The question of the right of these domestic insurers to recover such taxes illegally paid from the incorporated cities and towns to which same were distributed is not here considered.

September 1, 1951—051-297.

ABOLISHMENT BY CITY ORDINANCE

QUESTION: The City of Lynn Haven, Florida, for some years past has had a Firemen's Relief and Pension Fund in pursuance of the provisions of Ch. 175, F. S. The municipality has only one paid member of its fire department, the fire chief. Volunteer citizens, uncompensated, assist the fire chief in fighting fires. In pursuance of ordinance adopted some years ago under §175.05, F. S., the municipality has been collecting for the benefit of such fund the one per cent premium receipt tax authorized by said section. May the municipality by ordinance abolish such fund?

To: *Mr. Lee Curtis, Manager-Clerk, Lynn Haven, Florida:*

This fund, and the retirement system provided by Ch. 175, is created in any municipality (excepting those municipalities described in said chapter) by the provisions of said chapter, particularly §175.01, F. S. This section creates the fund in each incorporated city or town which has "a regularly organized fire department and which now owns and uses equipment and apparatus of a value exceeding five thousand dollars in serviceable condition, for extinguishment of fires, and which said city or town does not presently have established by law a similar fund."

Among others, the chapter provides benefits for "any person regularly employed by any city or town as a duly appointed or enrolled fireman or volunteer fireman" (§175.11). Section 175.15 provides specific benefits for volunteer firemen, "Where a municipality has a regularly appointed and enrolled fire department or a part-paid and part regularly and appointed volunteer fire department"

It is here assumed: (1) That at the time this municipality adopted the above mentioned ordinance in pursuance of §175.05, it met the requirements as to equipment provided by §175.01. (2) That at such time, it had a regularly organized fire department, consisting of one paid fireman (fire chief) and "regularly appointed and enrolled volunteer firemen." (3) That such fire department continues to meet the requirements set forth in subdivisions (1) and (2) of this paragraph. This opinion is conditioned upon such assumptions.

It is specifically set forth that when a municipality ceases to be within the provisions of §175.01, such fact shall be reported to the State Treasurer as Insurance Commissioner (§175.22, F. S.).

It appears that while this fund has been in existence for some years in said municipality, the total of such fund at this time is approximately \$800.

In view of the foregoing, in my opinion the above question is answered as follows:

(1) Assuming the facts set forth in this opinion to be true, the municipality may not by ordinance abolish said fund.

(2) If any of the above facts upon which this opinion is conditioned are in error, this office should be notified, with a clear statement as to existing facts. In that event, this opinion may be subject to change to meet such facts.

(3) In explanation of certain of the foregoing, it would appear that the words "regularly appointed and enrolled" volunteer firemen contemplate formal action by the governing body of the city providing for the services of such volunteer firemen and, in pursuance of such action, the keeping of municipal records evidencing at all times the appointment and names of such volunteers. It is extremely doubtful that there could be a "regularly organized fire department," as to personnel, within the meaning of such words as used in §175.01, if only the fire chief is paid and no provisions have been made or records kept for or with respect to volunteer firemen.

November 23, 1951—051-424.

OLD AGE AND SURVIVORS INSURANCE— LAKE CITY FIREMEN

QUESTIONS: 1. May the funds authorized to be collected by §175.05, F. S., be used for any purpose other than that set out in Ch. 175, F. S.?

2. Are Lake City firemen eligible to participate in the Federal Old Age and Survivors Insurance Plan?

To: Honorable W. H. Wilson, Jr., City Attorney, Lake City, Florida:

Chapter 27663, Laws of 1951, provides in detail for the creation, maintenance and administration of a Firemen's Relief and Pension Fund for the City of Lake City. Section 1 (a) of the Act authorizes said city to create a pension board composed of those persons selected in the manner set forth. Section 1 (b) of the Act provides: "There is hereby created a special fund to be known as Firemen's Relief and Pension Fund, exclusively for the purposes provided in this Act." Section 4 of the act sets forth the sources from which the fund is to be created and maintained; and among the named sources is the "net proceeds of 1% of the excise tax levied and collected under authority of Chapter 19112, Acts of 1939."

The request for opinion states that "This Act (Chapter 27663) was not acceptable to the Firemen here and was not put in operation. Further, no operation by the City has ever been carried out by virtue of Section 175.01, F. S. A., however, under the statute last

mentioned, the City has collected funds put in as I understand it by the insurance companies, which funds are now intact."

Chapter 175, F. S. (originally Ch. 19112, Laws of 1939) created a Firemen's Relief and Pension Fund, provided for the maintenance of such fund and the administration of the retirement system set forth therein. Section 175.01 created the fund in any municipality (except the municipalities described in said Chapter) which has "a regularly organized fire department and which now owns and uses or which may hereafter own and use equipment and apparatus of a value exceeding five thousand dollars in serviceable condition, for the extinguishment of fires, and which said city or town does not presently have established by law a similar fund." It would appear that the fund and the retirement system mandatorily are required by Ch. 175 in those cities and towns falling within the quoted description in §175.01.

Title 42, U. S. C. A., §418 (D), dealing with the extended social security benefits under the recently amended federal laws, provides in part that "no agreement with any state may be applicable . . . to any service performed by employees as members of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group." The phrase "retirement system" is defined for the purposes of Section 418 as ". . . a pension, annuity, retirement or similar fund or system established by a state or by a political subdivision thereof."

In view of the foregoing, the above questions are answered as follows:

(1) Only those cities and towns in this state which have had provided for them a Firemen's Relief and Pension Fund in pursuance of the provisions of Ch. 175, F. S., or which have such retirement systems recognized in Ch. 175 (§§175.01, 175.05, 175.26 and 175.27, F. S.), are authorized to impose the excise tax on gross receipts of premiums paid on fire and windstorm coverage in pursuance of and as contemplated by §175.05, F. S. Subject to the comments in the following sentence, it is stated generally that monies derived from the aforementioned tax must be used exclusively for the purposes of Ch. 175. It may be that in pursuance of legislation, monies in such funds lawfully may be diverted for other purposes. However, attention always must be given to the question of whether or not vested rights have accrued in favor of any person when it is proposed to divert funds accumulated incident to a retirement system. While attention is directed to the provisions of §175.26, we do not pass upon the legal propriety of the provision in Ch. 27663 mentioned above which seems to contemplate that the fund provided by said act shall in part be supplied by the excise tax above described in this paragraph.

(2) It is here assumed: (a) That heretofore the City of Lake City adopted an ordinance under authority of §175.05, imposing the one per cent gross premium receipts tax on insurers issuing fire and tornado coverage in said municipality as contemplated by said section. (b) That at the time such ordinance was adopted the municipality met the requirements as to a regularly organized fire department and as to equipment provided by §175.01. (c) That since it does not appear that the Insurance

Commissioner of Florida has been notified in pursuance of §175.22, F. S., that this municipality has ceased to be within the provisions of §175.01, such municipality continues to meet the requirements of said section.

No attempt is here made to deal with the question of whether the provisions of Ch. 27663 are mandatory. If that chapter mandatorily establishes the retirement system therein described, then such is a system within the meaning of the above quoted federal legislation. If no retirement system is mandatorily provided by that act, on the basis of the assumptions set forth above in this answer to the second question, it would seem that Ch. 175 continues to exist and to provide a retirement system as contemplated by the federal legislation mentioned.

It therefore appears that Lake City firemen are not eligible to participate in the Federal Old Age and Survivors Insurance plan afforded by the recently amended federal laws and made available under the provisions of Ch. 26841, Laws of 1951, to certain officers and employees of the state and political subdivisions thereof.

If any of the assumptions made in this opinion are erroneous, this office should be advised and consulted further.

MUNICIPAL PUBLIC WORKS

October 25, 1951—051-383.

WATER WORKS—SUBSCRIBERS' DEPOSITS—INTEREST ON

QUESTION: May a city owned water works be required to pay interest on the deposits which it requires of all subscribers to its services?

To: Honorable Harry E. King, City Attorney, Winter Haven, Florida:

It is well established that a public service company may require a deposit of its subscribers in order to insure itself of compensation for its service, and to protect itself against unknown or irresponsible persons, 43 Am. Jur. 604. This power is granted to a city in Florida by the rule and rate making power authorized in §180.13, F. S., and is generally utilized.

The deposit is in the nature of a pledge to secure future compliance with the terms of the contract between city and consumer and constitutes a claim against the city. In McQuillin's Treatise on Municipal Corporations it is stated that: "In the absence of legal provisions therefor, the general rule is that a municipal corporation is not chargeable with interest on claims against it without express agreement therefor, the only exception being where money is wrongfully obtained and illegally withheld by it." In *City of St. Petersburg (Fla.) v. Myers*, 55 Fed. 2d 810, no interest was allowed on a claim against the city where it was not promised in the contract which gave rise to the claim and where no demand had been made which would render the city in default. Also, in *Board of Public Instruction v. Barefoot (Fla.)* 193 So. 823, it was stated (after quotation from *Treadwell v. Terrell*,

(Fla.) 158 So. 512, to the effect that a state is not liable to pay interest on its debts, unless its consent to do so has been manifested by statute or contract) that this rule is equally applicable to a subdivision of the state or one of its governmental units.

It is my opinion that in the absence of an agreement in the contract for water service whereby the city obligates itself to pay interest on the deposit, and in the absence of any statutory or charter provision requiring the city to pay interest on such a deposit, the city cannot be required to pay interest on the type of deposit in question.

The question posed, with the provisions considered herein, should be answered in the negative.

POLICE OFFICERS' INSURANCE AND ANNUITIES

November 8, 1951—051-402.

POLICE OFFICERS' INSURANCE AND ANNUITY FUND— CONTRIBUTIONS—REFUNDS

QUESTIONS: 1. Should the State Treasurer make refunds to the various cities of their contributions to the Police Officers' Insurance and Annuity Fund of Florida, as set out in Ch. 26710, Laws of 1951?

2. Should such refund checks, if authorized, be signed only by the State Treasurer?

To: Honorable J. Edwin Larson, State Treasurer:

It is my opinion that the provisions of Ch. 26710, Laws of 1951, provide ample authority for making the refunds in question and for making them by checks signed only by the State Treasurer.

CHAPTER XIII

TAXATION AND FINANCE

GENERAL PROVISIONS

February 27, 1951—051-38.

TAX EXEMPTIONS — CHURCH CORPORATIONS AND ASSOCIATIONS—UNDIVIDED INTEREST—USE OF PROPERTY CRITERION FOR LIABILITY

QUESTION: Where a church owns an undivided one-third interest in a vacant lot, the other two-thirds being owned by individuals, adjoining the lot upon which the church plant is located, is the said church entitled to tax exemption upon the said one-third undivided interest in the said lot?

To: Honorable C. M. Gay, State Comptroller:

"Two provisions of the constitution are appropriate to the question presented, i.e., §1, Art. IX and §16, Art. XVI. The first establishing a 'uniform and equal rate of taxation' and 'just valuation' exempts property 'exempted by law for . . . religious . . . purposes.' The second declares all corporate property taxable with certain exceptions in which is included that 'held and used exclusively for religious . . . purposes.'" (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608). The expression of the Legislature, on the matter of exemption under said §1, Art. IX, declares as exempt from taxation "all houses of public worship and the lots on which they are situated, and . . . every parsonage . . . and all burying grounds" used in connection with such church and as its property (§192.06, F.S.).

It is apparent that under §1, Art. IX, of the Constitution, and said §192.06, F.S., "exemption of property for religious purposes would not obtain except as to the church building and the lot occupied by it" and the parsonage and burying grounds of the church. (see *Lummus v. Miami Beach Congregational Church*, supra). The undivided interest in the lot in question is therefore not within the tax exemption provisions of said §1, Art. IX, of the Constitution, and §192.06, F.S. This leaves for consideration the application of §16, Art. XVI, of the State Constitution.

Section 16, Art. XVI, of the State Constitution, can have no application if the church in question is an unincorporated one, as it is limited to corporations. The command of §16, Art. XVI, of the State Constitution, to tax all corporate property needs no legislation to make it effective as does the exemption provision of §1, Art. IX, of the said Constitution; and the same rule is applicable to the provision for tax exemption contained in said §16, Art. XVI. (*Lummus v. Miami Beach Congregational Church*, supra). Although the *Lummus v. Miami Beach Congregational Church* decision may have

been limited to some extent by the cases of *State v. Doss*, 150 Fla. 491, 8 So. 2d 17 and *Rogers v. Leesburg*, 157 Fla. 784, 27 So. 2d 70, we find nothing in said cases indicating an intent to overrule the said *Lummas* case.

Under said §16, Art. XVI, the utilization of the property is the criterion in determining its liability or non-liability for taxes (*State v. Doss*, 150 Fla. 491, 8 So. 2d 17; *Riverside Military Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870), this being true the question becomes one of fact and not one of law. The fact that the property in question may not be a part of the church plant would seem to be immaterial so long as it is "held and used exclusively for religious . . . purposes." As the church holds only an undivided interest in the property it follows that only the church's undivided interest should be considered in connection with tax exemption. The ownership of an undivided interest in a parcel of land doubtless gives the church some right of user of the lands; however, if the property is vacant and unused it may not be said that it is "held and used exclusively for religious . . . purposes." If the church owning the property in question is a corporation, the tax assessor should ascertain the use of the property in question and if the same is found to be presently used for some religious purpose it should be granted exemption as to the undivided interest of the church.

February 13, 1952—052-39.

TAX EXEMPT PROPERTY—PARSONAGE—ROOMS RENTED BY PASTOR

QUESTION: Where a parsonage is owned by a church and occupied by its pastor, who rents rooms in said parsonage to third persons for individual occupancy, is such parsonage entitled to tax exemption under §192.06, F.S., or the provisions of the State Constitution?

To: Honorable C. M. Gay, State Comptroller:

Under §16, Art. XVI, of the State Constitution, property held by a corporation "and used exclusively for religious . . . purposes," is exempted from taxation. The following property shall be exempt from taxation: "All houses of public worship and lots on which they are situated and . . . every parsonage . . . but any building being used as a house of worship which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property." (§192.06, F.S.). This provision of the statute was enacted pursuant to the following language in §1, Art. IX, of the State Constitution, to wit, "except such property as may be exempted by law for . . . religious . . . purposes." This provision of the constitution was made effective by §192.06, supra.

Ownership and the utilization of the property are the criterion for determining its exemption from taxation under the above mentioned statutes and constitutional provisions (Opinion 051-124 of May 17, 1951). Although under the general rule houses used as residences for pastors, rectors and priests of churches are not exempted as property used for religious purposes (Annotation 13 A. L. R. 1197) there is a minority rule holding them exempt from taxation (Annotation 13 A. L. R. 1203); however, in this State parsonages

are expressly exempted under §192.06 (4), *supra*. The proviso in said subsection seems to relate to the houses of worship and not the parsonages, to wit, "but any building *being a house of worship* which shall be rented or hired for any other purpose except for schools or places of worship, shall be taxed the same as any other property." Houses of public worship and parsonages are referred to separately in said §192.06 (4), F.S.

Under statutes providing for tax exemption of parsonages it was held in the following cases that the renting of space in such parsonages, not needed for occupancy by the pastor, did not defeat the right to exemption (*State v. Kittle*, W. Va., 105 S. E. 775; *Protestant Episcopal Church v. Prioleau*, 63 S. C. 70, 40 S. E. 1026; *District of Columbia v. St. James Parish*, App. D. C., 153 Fed. 2d. 621). Although it is stated in your file furnished us that the pastor rents rooms in the parsonage "the profits of which are used by himself and no accounting is made to the official board of the church for such receipts," we feel that this is with the full knowledge of the said board and without any objection on their part. The board may well consider that such income is a part of the compensation of the said pastor.

The above question should be answered in the affirmative so long as the renting of rooms is a mere incident to the use of the parsonage and not the main use of it.

May 17, 1951—051-124.

PROPERTY—EDUCATIONAL AND RELIGIOUS PURPOSES— LONG TIME LEASES EXEMPTIONS

QUESTIONS: 1. Is a corporation, organized and existing in another state, which owns housing facilities in this state for use of retired missionaries or ministers, upon the payment of \$3,500.00 for a single, or \$7,500.00 for a double, apartment for the remainder of their lives, entitled to exemption from taxation?

2. Where a non-profit corporation of this state owns a real estate subdivision which it leases to its members for terms of 99 years, who construct dwellings thereon and make the same their permanent homes, is such property entitled to exemption from taxation?

To: Honorable C. M. Gay, State Comptroller:

Under the constitution and laws of this state real property in this state used for municipal, educational, literary, scientific, religious or charitable purposes, may be granted exemption from ad valorem taxes (§1, Art. IX, and §16, Art. XVI, State Constitution; and §192.06, F.S.). Likewise, "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to exemption from taxation . . ." (§7, Art. X, State Constitution).

Ownership and the utilization of the property are the criterion for determining its exemption from taxation under §1, Art. IX, and §16, Art. XVI, of the State Constitution, and §192.06, F.S. (*Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*,

146 Fla. 752, 2 So. 2d 303; *State v. St. John*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School, Inc.*, 123 Fla. 810, 168 So. 232; and *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). To be exempt, under the above laws, the property in question should be used exclusively for educational, literary, benevolent, fraternal, charitable or scientific purposes. (See *State v. Doss*, supra). Under §192.06, F.S., the property must be actually occupied and used for some educational, literary, scientific, religious or charitable purpose; however, the rental of "not more than seventy-five per cent of the floor space" of such property may be considered as such use if "the rents, issues and profits" from such rental are used for the said purposes. The "utilization of the property is the criterion in determining the liability or non-liability for taxes" (*Riverside Military Academy, Inc. v. Watkins*, supra; *Dr. William Howard Hay Foundation v. Wilcox, Fla.*, 24 So. 2nd 237; *University Club v. Lanier*, supra; *Lummus v. Florida Adirondack School*, supra; and *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211).

These exemption provisions in the constitution and statutes are to be construed against the exemption claimant and in favor of the taxing power in case of doubt (*Steuart v. State*, 119 Fla. 117, 161 So. 378; *Lummus v. Florida Adirondack School*, supra; and *State v. Doss*, supra). Statutory and constitutional provisions for tax exemption are in the nature of special privileges and should be strictly construed (*Lummus v. Florida Adirondack School*, supra).

It is a universally accepted doctrine that a charitable or like institution does not lose its charitable character and tax exemption status merely because recipients of its benefits, who are able to pay, are required to do so, when the funds derived in this manner are devoted to the charitable purpose of the institution (Annotations in 34 A. L. R. 637; 62 A. L. R. 330, and 108 A. L. R. 286). Under the statement of facts contained in the file submitted with the request for opinion we find that no person may be admitted to the housing facilities in question until they are sixty-five years of age. Under the American experience table of mortality it appears that a person sixty-five years of age has an average life expectancy of about eleven years. Other tables give an approximate life expectancy. Evidently the costs to enter the housing facilities are the same without regard to the applicant's station in life or financial ability. Under the plan the monthly cost, based on the life expectancy of the applicant, for a single apartment would exceed thirty-five dollars per month and for a double apartment it would exceed seventy-five dollars per month. We are not advised what is to be furnished for this amount. These rates and the facilities furnished may be compared with the rates paid for other like and similar facilities. Whether the institution is to be deemed a charitable one (we doubt that it may be classified as a religious one within the constitution and statutes) must be determined from all the facts and circumstances.

Under the law it is the duty of the tax assessor to ascertain, from all the available evidence and by personal observation and inspection, whether or not the property claimed to be exempt, because used for some charitable purpose, is actually and primarily used for that purpose. Charitable purposes usually relate to aid and assistance to those unable to procure adequate assistance with their own

means; often exemption has been granted to charities on the ground that they render aid and assistance to those who might otherwise become public charges. The fact that the owner of the property may be a foreign corporation would not seem to defeat its right to exemption; the exemption being based upon the use of property for charitable purposes in this state or for the benefit of those in this state.

Although we are unable to answer the first question from the facts and circumstances before us we feel that we have furnished the formula from which the tax assessor may determine the question from all the facts and circumstances applicable.

We find nothing in the second question indicating that the property in question is used for any municipal, educational, literary, scientific, religious or charitable purpose. Evidently if entitled to exemption the lands must be within the purview of our homestead exemption laws. The occupants of the property appear to base their right to possession and occupancy upon long time leases. Long time leases are usually considered as personal property and not as real property (see opinion of this office of July 25, 1950, 050-363), this being true there is no legal title or equitable title to real property vested in the occupants. This being true the second question is answered in the negative. It might be well to inspect the instruments under which the several parties claim to be sure that they are all long time leases.

June 7, 1951—051-148.

RELIGIOUS PURPOSES—TAX EXEMPTION STATUS

QUESTION: Where real property in this state is owned by an individual but used for some religious purpose, is such property entitled to tax exemption by reason of its said use?

To: Honorable C. M. Gay, State Comptroller:

It appears from your file furnished us with the said request for opinion that the property is owned by an individual, who appears to be the sponsor of a newly organized religious organization, and that the property is used, with his consent and approval by such religious organization. It is presumed, for the purposes of this opinion, that the property is being used for religious purposes. The property being owned by an individual, §16, Art. XVI, of the State Constitution, which relates to taxation of property of corporations, has no application. The applicable statutory and constitutional provisions appear to be §192.06, F.S., which in so far as here applicable, provides that "the following property shall be exempt from taxation: . . . All houses of public worship and lots upon which they are situated, and all pews and steps (should read "slips") and furniture therein, every parsonage and all burying grounds . . ." This statutory provision was enacted pursuant to the authority contained in Section 1, Article IX, of the State Constitution, which in so far as here material, provides that the Legislature "shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for . . . religious . . . purposes." The above provision of the State Constitution is a limitation upon the power of the Legislature to provide for tax exemptions for real property, and is not self-execut-

ing (*Maxcy v. Federal Land Bank*, 111 Fla. 116, 150 So. 248). Under the statute the exemption for religious purposes appears to be limited to the house of worship, the lands on which it is situated, the parsonage and the burying grounds (See §192.06 (4), F.S.). Other religious uses are not within the statute. The exemption to corporate property under §16, Art. XVI, of the State Constitution, may be broader than the statutory exemption (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607).

Statutes providing for exemption from taxation are to be strictly construed against the claimant (*Lummus v. Cushman*, Fla. 41, So. 2d 895; *Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d 237; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303). Property used for religious purposes to be exempt must be used exclusively for such purposes (see *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211). Although it appears from the file before us that the property is being used for religious purposes, we find nothing in the record showing that it is being used exclusively as a house of public worship, as a parsonage and/or as a burying ground. The necessary use is not shown from the file to entitle the property to tax exemption. We are also of the opinion that the property, to be entitled to exemption from taxation, must be held by the religious organization or be held in trust for such organization. So long as an individual has a beneficial interest in the property, although it may be used for religious purposes, the property is not entitled to exemption from taxation.

The above question under the facts before us is answered in the negative. Reference is made to those certain annotations in 17 A. L. R. 1027-1063 and 168 A. L. R. 1222-1265 relating to the general question of tax exemption to religious bodies and organizations.

December 18, 1951—051-464.

CATHOLIC CHURCH PROPERTY EXEMPTIONS

QUESTION: Where the Catholic Church owns several parcels of real property, and some tangible personal property, in one of the counties of this state which is used, some for a place of worship, some for an educational plant, some for charitable uses and probably other parcels for other similar uses, is such property entitled to tax exemption?

To: Honorable C. M. Gay, State Comptroller:

It was held in the case of *Reid v. Barry*, 93 Fla. 849, 112 So. 846, text 859-60, that the Roman Catholic Bishop of St. Augustine, in the State of Florida, was a corporation sole capable of taking and holding title to real property. In this connection see also *Willard v. Barry*, 113 Fla. 402, 152 So. 411, text 413. This being true the property contemplated by the above question will be presumed to be vested in a corporation sole; that is, a Bishop of the Roman Catholic Church. This being true note must be taken of §16, Art. XVI, of the State Constitution, which requires that the property of all corporations in this state "shall be subject to taxation, unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," as well

as §1, Art. IX, of the State Constitution, which authorizes tax exemption for such property used for municipal, education, literary, scientific, religious or charitable purposes.

Section 192.06, F.S., which makes effective the exemption provisions of said §1, Art. IX, of the F.S., provides tax exemption for property used for educational, literary, fraternal, charitable and scientific purposes, houses of public worship and parsonages, and other purposes not here material. Section 192.07, F.S., provides tax exemption to real property of religious and charitable institutions engaged in the support, maintenance and care of orphan and dependent children.

Under §192.06 (4), F.S., as well as §16, Art. XVI, of the State Constitution, the property used by the church as a house of public worship and any parsonages used in connection therewith would clearly be entitled to exemption. Although property owned by a church is used for educational purposes it probably is not entitled to tax exemption as property used for religious purposes, but would be entitled to tax exemption as property used for educational purposes. Although §192.06 (4), limits tax exemption for religious purposes to the church house and parsonage, there is no such limitation, when the property is owned by a corporation, under §16, Art. XVI, of the State Constitution (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607). Any of the property above mentioned used for religious purposes, whether or not within the purview of 192.06 (4), F.S., would seem to be entitled to exemption.

With regard to the title of the property used by the Order of St. Benedict and the Benedictine Sisters, we are without knowledge as to who is the holder of such title; whether it is also vested in the Bishop or otherwise.

With regard to the above question generally it may be said that if the property in question is used for any religious, educational, charitable or similar purpose it will be entitled to tax exemption. No definite answer may be given as to any particular parcel of property without full information as to its ownership and use. The right of each parcel of land, and item of tangible personal property, to tax exemption must be determined from the facts applicable to each particular case. This seems to answer the above question as well as may now be answered. The value of the property is not to be considered, only the ownership and use thereof.

March 21, 1952—052-101.

PROPERTY—EXEMPTION STATUS—SOCIAL CLUBS— LABORERS—WORKING MEN

QUESTION: Where organizations of laborers, working men, and other groups, maintain social or fraternal clubs for the mutual enjoyment, benefit and participation of their members, is the real and tangible personal property of such clubs entitled to exemption from ad valorem taxes?

To: Honorable C. M. Gay, State Comptroller:

Under the provisions of the State Constitution (§1, Art. IX, and §16, Art. XVI) only property "held and used exclusively for re-

ligious, scientific, municipal, educational, literary or charitable purposes," may be exempted from taxation.

Section 192.06 (10), F.S., provides that "real property owned and used by labor organizations, *with charters from national or international organizations*, which is used exclusively by them as their meeting halls, training halls or educational purposes is hereby defined as being property within the purview of §1, Art. IX, of the State Constitution and entitled to tax exemption thereunder..." The constitutionality of this statutory provision has not been determined by the courts.

It appears that the organization or club in question holds a charter, under the statutes of this state providing for the incorporation of corporations not for profit, the same having been granted by the Circuit Court in and for Volusia County, Florida, sometime in 1949, and recorded, on June 1, 1949, in Corporation Book 8, page 313, of the public records of said county. The corporation in question is known and designated as the "Plumbers and Fitters Club." The club appears to have been formed for "the mutual enjoyment, benefit and participation of so many members of the aforesaid Local Union No. 295 (of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada) as may become members of this club." It, therefore, appears that the said Plumbers and Fitters Club is not within the purview of said §192.06 (10). It was held in *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d. 863, that real property held by labor unions and used as lodge halls and business offices was not exempt from taxation as property used for "educational" or "charitable purposes," although the union contributed to certain charities. It was stated that "mere incidental use for such purposes (i.e. the purposes mentioned in the Constitution) is not enough."

In *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, it appears that the club was incorporated under the statutes of this state providing for corporations not for profit; the club had about 120 members; maintained a small library and a dining room for its members; provided one or more scholarships at the University of Florida; maintained its clubhouse for its members and other social organizations; one did not have to be a college graduate to become a member; its purpose was to provide recreation for its members. Recreation and social intercourse was the outstanding feature for which the clubhouse was used, and it was claimed that the clubhouse was exempt under the Constitution and statutes. The property was held not to be entitled to the exemption claimed. Evidently its primary use was not for any of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, of the State Constitution, such uses, if at all, were merely incidental to the main use.

From the above and foregoing observations and authorities it is evident that the use of the property is the guiding star in determining its exemption under the above mentioned constitutional and statutory provisions of this State. It is the primary duty of the tax assessor to determine these facts, from such evidence as may be furnished him and as he may obtain from his own investigation, applying the rules above mentioned. To be entitled to exemption the property must be held and used for some religious, scientific, mu-

nicipal, educational, literary or charitable purpose, which purpose must be the primary and not some secondary or incidental use.

The above question is therefore answered in the negative, unless and until it is shown that the use mentioned is primarily a religious, scientific, municipal, educational, literary or charitable use, and in this connection the observations of the court in *Johnson v. Sparkman*, and *University Club v. Lanier*, above referred to, should be kept in mind.

May 17, 1951—051-118.

"MUNICIPAL CASINO PROPERTY"—COUNTY TAXES— ASSESSMENT

QUESTION: Where a municipality in this state leases certain real property owned by it to an individual or a private business corporation, for twenty-five years, at an annual rental either fixed or subject to be fixed in accordance with the provisions of the lease, to be used only for "proper, legitimate and lawful purposes," which do not clearly appear to be governmental in their nature, is such property, including the respective rights of the said parties, subject to county taxes?

To: Honorable Sherwood Spencer, City Attorney, Hollywood, Florida:

Although it does not appear from the request for opinion, we are advised that the property is used for a casino, having thereon buildings and structures used for stores, concessions, stands and other places of business, including a swimming pool and bath houses in connection therewith. The property is evidently used by the lessee and those claiming under him for profit. The lessee is required to maintain on the property public rest rooms and toilets and a place for housing a municipal fire station. These probably are the only buildings not used either directly or indirectly for profit. We are advised that the tax assessor for Broward county placed the property on the county tax assessment roll for the tax year 1950 and extended taxes thereon. We are further advised that the lessee contends that the property is not subject to taxation, his ground for exemption evidently being that the fee title to the property is vested in the municipality.

From the authorities it appears that there are two types of tax exemption. In the first class the exemption is dependent upon the ownership of the property and the nature of the body owning the same regardless of the use to which the property is put; in the other class the exemption is dependent upon the character of the property or the use to which it is put (Annotation 155 A.L.R. 425). In this state real and personal property is subject to taxation unless exempt by law for some *municipal*, educational, literary, scientific, religious or charitable purpose (§1, Art. IX and §16, Art. XVI, of the State Constitution). In this state it appears that the utilization of the property is the criterion for determining its exemption from taxation under said constitutional provisions and §192.06, F.S., *Riverside Academy v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. John*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School*,

Inc., 123 Fla. 810, 168 So. 232; and *University Club v. Lanier*, 119 Fla. 146, 161 So. 78). Under said §192.06, there is exempted from taxation "all public property of the several . . . cities, villages and towns . . . in this state used or intended for public purposes." The above provision of §192.06, seems to be declaratory of the general rule independent of statute (*Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707, text 709). "It is a general rule that the exemption is determined by the use and ownership of the property and not altogether by the charter of the institution which owns and uses that property. It is only property *that is held and used exclusively* for religious, scientific, *municipal*, educational, literary, or charitable *purposes* which may be exempt from taxation under the Constitution." (119 Fla. 146, 161 So. 78, text 79). (Emphasis supplied) It appears from the above and foregoing authorities that Florida follows the rule that tax exemption is based upon the character and use of the property and not upon its ownership. This being true the mere fact that the legal title to the property is vested in the municipality does not of itself show that the municipality is entitled to tax exemption.

In the case of *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470, the municipality had leased certain lands owned by it to the Kraft Corporation for a period of fifty years with certain renewal rights, said lands to be used for the construction of docks and terminal facilities for use by the Kraft Corporation and by the public. The corporation was to pay the municipality a stated rental, plus a percentage of the profits in excess of a stated sum. This property was held to be subject to county taxation.

"There is no implied immunity from taxation of property owned by a municipal corporation, but which is not devoted to public or governmental uses, but held by the municipality in its private or commercial capacity and as a source of profit or to serve some mere convenience of the citizens. So, in the absence of an express exemption, land of a city or other municipal corporation which is rented out to private parties and from which it derives a revenue is subject to taxation; and the same rule applies to wharf property of a city which is in a similar manner made profitable to it, to a public market or market houses from which it derives a revenue, and to municipal farms operated for a profit." (61 C. J., 370, §367).

"If public property is exempt only when devoted to a public use, the question arises as to the effect of receiving an income from public property. This depends, at least to some extent, on the nature and source of the income. The income may be (1) merely incidental to a public use of property, or it may be (2) the direct result of a lease of all the property. If the income is merely incidental, the rule is well settled. Where the primary and principal use to which property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to a public use, so as to prevent its being exempt from taxation

"The second class of cases relate to income not incidental to the use of the public property but the result of a lease of the property or other arrangement whereby revenue is the primary

purpose. As to this class the law is not so well settled. Some cases hold, expressly or in effect, that if an income or profit is derived from public property, not as an incident to its use as a public agency, but as a direct result of a lease of the property or other arrangement whereby revenue is the primary purpose, the property is taxable because not held for a public purpose. There are decisions, however, to the contrary, especially where the property leased is a public utility, such as a public ferry, wharf property, or the like . . ." (2 Cooley on Taxation, 4th Ed. 1342 et seq., 640).

"Where the constitutional or statutory tax exemption relates to property used for municipal or public purposes, it has been held that the property of municipalities or other public bodies are not exempt unless devoted to public or governmental uses." (Annotations 155 A.L.R. 425; 101 A.L.R. 788; and 129 A.L.R. 482). "Where an income or profit is derived from municipally owned property, not as an incident to its use as a public agency, but from its use primarily for the purpose of producing revenue, it cannot be said to be devoted to public use, and is, therefore, subject to taxation." (Annotations in 3 A.L.R. 1449; 101 A.L.R. 791; and 129 A.L.R. 485). It was held in *Swanton v. Highgate*, 81 Va. 152, 69 A. 667, that where the use to which property owned by a municipality is put is partly public and partly private, with no way of ascertaining how much was put to either use, that the whole was taxable.

From the above and foregoing observations it is clear that if the property in question was entitled to tax exemption it was from its use and not from its municipal ownership. Whether the property was used for some municipal purpose or not is a question of fact to be determined in the first instance by the tax assessor, whose determination was subject to review by the county board of equalization upon appeal. We are not advised as to what action was taken by the municipality or the lessee after it was placed on the tax roll by the tax assessor. With the facts now before us we are unable to definitely pass upon the right of the property to tax exemption.

The question of exemption being largely one of fact, that is the determination of the use of the property, we feel that the assessment at the most should be considered as voidable and not void. This being true it may be that the assessment became final under the limitation contained in §192.21, F.S., giving thirty days to bring a proceeding to test the validity of the assessment.

March 17, 1952—052-89.

HOMESTEAD EXEMPTION—TAX ROLLS—ERRORS— CORRECTIONS

QUESTION: Where, after the equalization of the tax roll, the tax assessor finds that he has erroneously granted an application for homestead tax exemption, what procedure should be followed in correcting that error?

To: Honorable C. M. Gay, State Comptroller:

The reading of §193.37, F.S., seems to indicate an intention on

the part of the Legislature that material errors of the tax assessor may be corrected, even when found by the tax collector. Under §192.21, F.S., acts of omission or commission, on the part of any of the taxing officials, may be corrected at any time "by the officer or party responsible for the same *in like manner as is now or may hereafter be provided by law for performing of such acts in the first place*, and when so corrected they shall be construed as valid ab initio and shall in no way affect any process by law for the enforcement of the collection of any such tax." Under §193.37, F.S., the correction is made through the use of a supplemental or additional tax roll. Under §192.21, F.S., the correction is made "in like manner as is now or may hereafter be provided by law for performing such act in the first place."

Under §192.19, F.S., the Legislature has provided the machinery for granting or refusing applications for homestead tax exemptions. Under this section, after the application for the exemption is filed (and in this connection tax assessors have no right to refuse to receive and file an application for homestead tax exemption although they know at the time that it will be rejected by them) the tax assessor is required to carefully examine it, applying to it whatever other and additional information that may be before him acquired by his own investigation or otherwise (which additional information probably should be preserved in memorandum form especially where an appeal might be taken from his ruling), and either grant or reject it. "If after due consideration, the tax assessor should find the applicant not to be entitled under the law to the exemption asked for, *such tax assessor shall immediately make out in triplicate form a notice of such disapproval, giving his reasons therefor, a copy of which notice shall be served upon the applicant by the tax assessor either by personal delivery or by registered mail to the post office address given by the applicant and shall make return of the manner in which such notice was served upon said applicant upon the original notice thereof and immediately file same with the clerk of the board of county commissioners of said county.* The third copy of said notice shall likewise have entered upon it the return of the tax assessor as to service had and filed among the permanent records of his office. *The original notice of disapproval of application for exemption, with entry of service upon the applicant, when filed with the clerk of the board of county commissioners shall constitute an appeal of the applicant from the decision of the tax assessor, refusing to allow the exemption for which application was made, to the board of county commissioners, when sitting as a board of equalization, and said board of county commissioners, when sitting as a board of equalization, shall review the application and evidence presented to the tax assessor upon which the applicant based his claim for exemption and shall hear the applicant in person or by agent in behalf of his right to such exemption, and the board of county commissioners shall reverse the decision of the tax assessor in said cause and grant exemption to the applicant if in its judgment the applicant is entitled thereto, or affirm the decision of the tax assessor, and such action of the board of county commissioners shall be final in said cause unless the applicant shall within fifteen days from the date of refusal of said application of said board of county commissioners, sitting as a board of equalization, file in the circuit court of the county in which the homestead is sit-*

uated a proceeding against the assessor for a declaratory decree . . ."

In the light of the requirement of §192.21, F.S., that acts of omission or commission on the part of taxing officials may be corrected "in like manner as is now or may hereafter be provided by law for performing such acts in the first place," and §192.19, F.S., providing for the manner of granting or refusing applications for homestead tax exemption in the first place, we feel that the following proceedings would be proper:

1. The tax assessor, as soon as he discovers his mistake, should make a further investigation of the said application, and finding that the application should have been rejected he should prepare a notice of rejection (in the form of an order) reciting his error, recalling and correcting his prior order, and rejecting the application for exemption.

2. This order or notice of rejection should be served upon the applicant as provided above and the original notice, with proof of service, should be filed with the clerk of the county commissioners.

3. The county commissioners should give the applicant a hearing and either affirm or reverse the action of the tax assessor as justice may require. Due notice of the hearing should be given the applicant.

4. If the rejection is approved by the county commissioners the tax assessor, pursuant to authority conferred upon him by §192.21, F.S., should then make the correction upon the tax roll. The tax collector should be properly charged with this addition to the tax roll the same as where a supplemental tax roll is made and filed.

We feel that a hearing before the county commissioners, sitting as a board of equalization, is necessary under §192.19 in order to give the applicant due process of law.

Although early cases, of which *Sparkman v. State*, 71 Fla. 210, 71 So. 34 is an example, seems to have held that the county commissioners, as boards of tax equalization, lost jurisdiction after the general equalization meeting, such decisions were based upon statutes prior to the adoption of what is now §192.21, F.S. We feel that their power was extended by said §192.21, to include corrections such as that above mentioned. These observations answer your above question.

March 26, 1952—052-108.

HOMESTEAD EXEMPTION CLAIM—RESIDENCE IN HOUSE TRAILER

QUESTION: Where a person owns the legal title or beneficial title in equity to real property in this state and resides thereon in a house trailer or other temporary structure, is such person entitled to homestead tax exemption under the constitution and statutes of this state?

To: Honorable J. N. Lummus, Jr., County Tax Assessor, Dade County, Miami, Florida:

Your attention is directed to §7, Art. X, of the State Constitution, which provides in part that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation . . ." §192.12, F. S., is substantially identical with the said constitutional provision. From the said constitutional and statutory provisions there appears two requirements for a person to qualify for homestead tax exemption: ownership and permanent home. In the above question ownership is apparent.

We find nothing in either the state constitution or the statutes defining the nature or extent of the building or facility constituting the home. It is generally considered that the right of homestead is incidental to an interest in the land rather than the buildings located thereon and considered apart from the soil (40 C. J. S. 492, §52). "While the 'dwelling house' or 'habitation' or 'home' is not required to be constructed in any particular style or built in any prescribed manner, in order to be exempt, it must be in good faith and truly the dwelling house or residence or abode of the owner" (26 Am. Jur. 51, §81), or in the language of our state constitution it must be in good faith and truly the "permanent home" of the owner or those naturally or legally dependent upon him. The question seems to be whether or not the owner is in good faith making the premises his permanent home or the permanent home of another legally or naturally dependent upon him. The real and important question is whether or not the owner is in good faith making the premises his permanent home.

The nature and extent of the building or other facility constituting the home is immaterial, except in so far as the same may constitute evidence of intention to make the premises the permanent home of the owner. The building or facility may be a mansion or a hovel, it may be an adobe hut or a single room shack. It is the use to which the property is put that determines the homestead character of the property; the occupancy must be bona fide and not a sham. The fact that the premises are occasionally occupied as a lodging place or temporary residence will not impress the homestead character thereon. (40 C. J. S. 463, §35).

Where a homestead claimant is residing in a temporary structure, such as a house trailer or similar facility, such fact should be taken into consideration by the tax assessor in determining permanency of residence; although such fact should not within itself be held to require a denial of homestead tax exemption. All facts and circumstances must be taken into consideration. Although temporary housing facilities, upon a parcel of land claimed by the owner as his homestead, may indicate temporary residence, evidence may be submitted to overcome that presumption and show permanent residence. If bona fide permanent residence is shown, that is the claimant produces sufficient evidence to show that the premises are his bona fide permanent home, exemption should be allowed, notwithstanding he may be residing in temporary housing facilities on the premises.

The above authorities and observations seem to furnish rules

and regulations for answering the above question. The determination of the evidentiary facts is for the tax assessor, subject to review by the county tax equalization board.

January 14, 1952—052-10.

MUNICIPALITIES—TAX SALE CERTIFICATES—LIEN— LIMITATIONS

QUESTION: What is the period of limitation upon the lien of municipal tax sale certificates when issued at the tax sale to the municipality and subsequently assigned to an individual holder?

To: Honorable Jess Mathas, Clerk Circuit Court, DeLand, Florida:

Under §196.12, F. S., the life of a tax sale certificate, issued by a municipality for municipal taxes and held by private holders, is twenty years from the date of its issuance; however, this limitation does not seem to be applicable to municipal tax sale certificates so long as they are held by the issuing municipality. When a tax sale certificate issued and held by a municipality is assigned to an individual holder the limitation becomes applicable so long as the said certificate is not twenty years old at the time of its issuance, and the certificate becomes barred by the statute upon its becoming twenty years old reckoned from the date of issuance. If the certificate was twenty years old at the time of its assignment by the municipality then there is a five-year limitation reckoned from the date of the assignment by the municipality.

June 9, 1952—052-178.

PROPERTY—RIPARIAN RIGHTS—MURPHY ACT DEED— SEPARATE ASSESSMENT

QUESTION: May a Murphy Act deed be issued upon a tax sale certificate based upon an assessment against riparian rights to certain lands assessed separately from such lands?

To: Trustees Internal Improvement Fund:

It appears from the said letter from Honorable Jess Mathas that the riparian rights in lot 142 of the Walker Grant in Volusia county, Florida, were assessed for ad valorem taxes for the years 1931 and 1932, separately from the lands to which they were appurtenant, and were sold for delinquent taxes pursuant to such assessment; now being evidenced by tax sales certificates 6013 of the tax sale of 1932 and 26011 of the tax sale of 1933, of Volusia county, Florida. Application for Murphy Act deeds, based upon said tax sale certificates, have now been made.

Although it has been held that "riparian rights are not taxable separately but as a part of the riparian lands (2 Cooley on Taxation, 4th Ed., 1230, §568 and authorities cited in note 54) we are here confronted with such an assessment. It is presumed that in taxing the real property to which the riparian rights in question are appurtenant that they were excluded from such assessment and were taxed separately and apart therefrom; that the value of the said riparian rights was deducted from the value of the property to which it was appurtenant for taxation purposes, so

that there has been no double assessment of said rights. This seems to take this case out of the rule followed in *Spring Valley Water Company v. Alameda County*, 24 Cal. App. 278, 141 P. 38. We feel that under the Florida taxing statutes that the riparian rights in question should have been assessed as a part of the lands to which they were appurtenant (see *Bancroft Investment Corporation v. City of Jacksonville*, 137 Fla. 546, 27 So. 2d. 162, text 167), however, this would appear to be an omission or commission on the part of the tax assessor (§192.21, F.S.) which does not "operate to defeat the payment of said taxes."

In this state riparian rights are an incident to the real property to which they are appurtenant (*Ferry Pass Inspectors and Shippers Association v. White River Inspectors and Shippers Association*, 57 Fla. 399, 48 So. 643; *Tampa Water Works v. Cline*, 37 Fla. 586, 20 So. 780). They are presumed to pass with the lands, unless there is a separation of them (*Panama Ice and Fish Company v. Atlanta and St. Andrews Bay Railroad Company*, 71 Fla. 419, 71 So. 608; *Caples v. Taliaferro*, Fla., 197 So. 872). They constitute property rights, which may not be taken by the State without just compensation (56 Am. Jur. 727-8, §274). They may be severed from the lands to which they are appurtenant (56 Am. Jur. 740, §288).

"This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the Legislature in the manner" provided by the State Constitution (*Bancroft Investment Corporation v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d. 162, text 170). This being true the riparian rights in question, being valuable property, should bear its due portion of the burden of government; either by inclusion with the taxes on the lands to which appurtenant or by separate taxation. Although the assessor should probably have assessed them as a part of the lands to which appurtenant instead of separately, this, under §192.21, was not such an error as will invalidate the assessment and permit the property to go untaxed. The assessment not having been proceeded against within the time allowed by §192.21, F. S., is valid.

The above question is, therefore, answered in the affirmative.

November 5, 1952—052-307.

BOARD OF PUBLIC INSTRUCTION—WORD "COUNTY" INCLUDED

QUESTION: Does the use of the word "County" in Ch. 26974, Laws of 1951; §192.60, F. S., include the Board of Public Instruction?

To: *Honorable John E. Cicero, City Attorney, Department of Law, Miami, Florida:*

Chapter 26974, Laws of 1951, in pertinent part, provides:

"Whenever any County of this State has heretofore acquired, or shall hereafter acquire, title to any real property, the taxes of all *political subdivisions, as defined in Section 1.01, Florida Statutes, 1949*, upon such property

for the year in which title to such property was acquired, or shall hereafter be acquired, shall be that portion of the taxes levied or accrued against such property for such year which has expired at the date of such acquisition bears to the entire year, and the remainder of such year shall stand cancelled." (Emphasis supplied).

Section 1.01, F. S., in pertinent part provides:

"1.01 Definitions.—In construing these statutes and each and every work, phrase, or part hereof, where the context will permit:

"(10) The words . . . 'public body', 'body politic' or 'political sub-division' include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts and all other districts in this state."

A careful reading of Ch. 26974, Laws of 1951, would seem to indicate that it was the intention of the Legislature to provide thereby a uniform method for the pro rata division of taxes levied or accrued upon real property acquired or thereafter acquired by all political subdivisions as defined in §1.01, F. S. Since the statute is remedial in nature it appears desirable that it should be given a liberal construction in order to effectuate the Legislative intent. This principle is succinctly stated in Thompson, *Statutory Construction*, (1940), §§197, 251, and 254 in pertinent part as follows:

"§197. Inaccurate, Inapt and Awkward Language.—There is also a presumption that the legislature knew the meaning of the words which it has used in an enactment. This presumption, however, like all other presumptions, may be rebutted. *Moreover, many laws contain words which have not been used accurately. But the use of inapt or inaccurate language or words, will not vitiate the statute if the legislative intention can be ascertained.* The same is equally true with reference to awkward, slovenly, or ungrammatical expressions; that is, such expressions and words will be construed as carrying the meaning the legislature intended that they bear, although such a construction necessitates a departure from the literal meaning of the words used. And the court may go further; even the arrangement of the words and phrases, in a statute may be disregarded, where the statute in its enacted form on its face is without meaning, in order that it may give expression to the legislative intent, if one be ascertainable, from the words actually employed." (Emphasis supplied)

§251. Remedial statutes.—Remedial statutes, that is, those which supply defects, and abridge superfluities, in the former law, *should be given a liberal construction in order to effectuate the purposes of the legislature, or to advance the remedy intended, or to accomplish the object sought, and all matters fairly within the scope of such a statute should be included, even though outside the letter, if within its spirit or reason . . .*" (Emphasis supplied)

§254. Statutes pertaining to Remedies and Procedure

in General.—Statutes which relate to remedies and *procedure*, perhaps because they are remedial in character, *should also receive a liberal construction in order to promote justice and to carry out their respective purposes, and especially so as to secure a more effective, a speedier, a simpler, and a less expensive administration of the law...*" (Emphasis supplied)

I think, therefore, that in order that the legislative intent may be given effect, the word "County" as used in Ch. 26974, Laws of 1951, must be understood to have been intended by the legislature in its general connotation as opposed to its more technical meaning as a specific political entity of the state, particularly since the statute reveals no legislative intent otherwise. See Thompson, *Statutory Construction*, (1940), §189.

In *State v. Board of Public Instruction for Dade County*, 126 Fla., 142, 170 So. 602, the Florida Court in discussing the nature of a board of public instruction for certain purposes significantly said:

"The Board of Public Instruction directs the public school policy of the county, finances the public schools, issues all bonds for special tax school districts, and in a large measure directs their policy, is a body corporate, and performs other duties imposed on it by statute. As shown by this opinion, Boards of Public Instruction have been frequently authorized to issue bonds and have been held responsible for their payment.

"We think, therefore, that it may appropriately be termed a 'county'..."

Such a conclusion as indicated by the Florida Court above would seem to be indicated regarding your question. A Board of Public Instruction in essence is an arm of the county and it would appear eminently reasonable that for certain purposes it may and should be considered a "county." Such an interpretation of the word "county" in your case appears desirable as an effectuation of the legislative intent to provide a uniform method for the pro rata division of taxes accrued upon real property hereafter acquired by county political subdivisions in the interest of efficiency and economy. Indeed, to limit the applicability of the statute to the single specific political entity the word "county" denotes would appear in this instance to defeat that intent and work an unnecessary and unfortunate penalty in the case of County Boards of Public Instruction.

Your question is accordingly answered in the affirmative.

September 14, 1951—051-317.

STATE ROAD DEPARTMENT—ADVANCE OF FEDERAL HIGHWAY FUNDS TO

QUESTION: May the state road department of this state legally receive and accept advance payment of federal aid highway funds from the federal government, before the same has been earned by the department through construction of federal aid roads,

and use the same in connection with highway construction?

To: Honorable C. M. Gay, State Comptroller:

While the federal statutes, regulating the use of federal funds in connection with state highway construction, federal aid is available only in connection with certain types of state highway construction and the states are required to make available state funds for the construction of the federal aid highways. (§§6-8, title 23, United States Code). When a state meets the requirements of the federal statutes for federal aid in road construction federal funds are apportioned to the account of that state and become available when the state meets the requirements of the statutes. (§11, title 23, United States Code). After a state has complied with the provisions of the federal statutes and funds have been apportioned to its account it may submit its plans for road construction to the federal government where federal aid is desired, when these plans are approved by the federal government, the federal government causes the federal funds for aid in the construction of the roads reflected by the said plans to be earmarked for such purpose (§12, title 23, United States Code).

Upon the construction of the approved road by the state the federal government causes to be paid to the state the federal aid funds; however, the proper agent of the federal government may, "from time to time, make payments on such construction or reconstruction as the work progresses . . ." (§14, title 23, United States Code). Under some conditions we are informed that the federal government makes advances of such federal funds in anticipation of the construction of federal aid roads under the statutes.

When federal aid highway funds are advanced to the state prior to the actual construction of the federal aid highway or highways to which applicable, there is an obligation on the part of the state agency receiving the funds to use the same as contemplated by the federal statutes and laws or to return the same to the United States. The advanced funds are similar to or in the nature of trust funds received by the state for definite and particular purposes and may not legally be used for any other purposes. Any such funds advanced to the state by the federal government is in the nature of an advancement and not a direct loan. When the federal government makes an advancement of such funds to the state it does so with full knowledge of the provisions of the state constitution prohibiting the state from incurring an obligation to pay money or evidencing any such obligation by bonds, notes, or other written obligations to pay money. (see §6, Art. IX, of the state constitution, and Florida cases construing the same). The promise of the state at the most can only be to return the unused funds and to match the portion of the funds used with state funds in the construction of highways qualified to receive federal aid. If the federal government elects to make such an advance payment of federal aid funds it does so with full knowledge of the provisions of the state constitution above mentioned.

We, therefore, know of no legal reason why the state road department may not accept an advancement of such funds so long as it received the same to be used either in compliance with the requirements of the federal statutes or to be returned to the federal

government if not used and does not accept the same as a loan of money from the federal government. Although the state would not be liable in damages for any illegal use of such funds the members of the state road department responsible for any illegal use, might be personally liable in damages.

December 19, 1952—052-331.

INTANGIBLE PERSONAL PROPERTY—NONRESIDENT BUSINESS—ESTATE TAX LAW APPLICABLE

QUESTION: Is the interest of a resident of Florida in intangible personal property owned by a copartnership, of which the resident is a member, the business of which is located and transacted wholly without the state, upon the death of the resident, subject to evaluation and taxation under the provisions of the estate tax law of Florida?

To: Honorable C. M. Gay, State Comptroller:

Section 198.12, F. S., requires the return of estate tax to set forth "(1) a description and the value of gross estate of the decedent at the time of his death, as defined in the applicable federal revenue act." The federal revenue act (Title 26, §811 U.S.C.) provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible wherever situated, except real property situated outside of the United States.

- (a) Decedent's interest. To the extent of the interest therein of the decedent at the time of his death;"

The interest of a resident of the State of Florida, in intangible personal property, wherever situate within the United States, at the time of his death is subject to evaluation and taxation as a part of his gross estate. (§198.12 (4))

The conclusion reached herein is not affected by the fact that the identical intangible personal properties may be subject to valuation and taxation by the state in which the partnership enterprise may have had its business situs.

The question is answered affirmatively.

TAX ASSESSMENTS AND TAX SALES

January 2, 1952—052-1.

FLOOD CONTROL DISTRICTS—ASSESSMENT— COLLECTION—COUNTY TAXING OFFICIALS— COMPENSATION

QUESTION: What is the measure of compensation to be received by the county tax assessor and collector for assessing and collecting the taxes assessed and collected by them for the Central and Southern Flood Control District, especially upon the first ten thousand dollars of such taxes assessed and collected in a particular county?

To: Honorable Bryan Willis, State Auditor:

The Central and Southern Flood Control District was created and established by Ch. 25270, Laws of 1949, §4 of which provides in part that "other than as herein provided, Central and Southern Flood Control District shall operate under and be governed by the provisions of Ch. 25209 (House Bill No. 407), Laws of 1949 (now appearing as Ch. 378, F. S.)" It is provided in §3 of said Ch. 25270 that "the tax assessor, tax collector, and clerk of the circuit court of the respective counties within or partly within said district shall be entitled to compensation for services performed in connection with said tax at the same rates as apply to county taxes." Section 378.29 (4), F. S., provides that "the taxing officers of the county are hereby authorized and directed to perform the duties devolving upon them under this chapter, and to receive compensation therefor at such rates or charges as are provided by law with respect to similar services or charges in other cases."

Under the said statutes the governing board of the district levies an annual ad valorem tax on all taxable property in the district, as determined for county taxing purposes, which tax "shall be extended by the county tax assessor on the county tax roll and shall be collected by the tax assessor *in the same manner and time as county taxes*, and the proceeds therefrom paid to said district. Said tax shall be a lien until paid on the property against which assessed, and enforceable in like manner as county taxes." (§3, Ch. 25270, *supra*). Under §378.29, F. S., the governing board of the district is required each year to "certify to the tax assessor of the county in which the property is situate, timely for the preparation of the tax roll, the tax rate to be applied in determining the amount of the district's annual tax, and the tax assessor shall extend on his county tax roll the amount of such tax, determined at the rate certified to him by the governing board, and shall certify the same to the tax collector *at the same time and in like manner as for county taxes*. Collection of district taxes, the issuance of tax sale certificates for non-payment thereof, the redemption or sale of said certificates, the vesting of title by tax forfeiture, and the sale of the land and other real estate so forfeited shall be at the same time, in conjunction with and by like procedure and of like effect as is provided by law with respect to county taxes, nor may either the county or the district taxes be paid or redemption effected without the payment or redemption of both. The title to district tax forfeited land shall vest in the county on behalf of said district along with that of the county for county tax forfeited land, said district tax forfeited land to be held, sold, or otherwise disposed of by said county for the benefit of said district. The proceeds therefrom, after deducting costs, shall be paid to the district in amounts proportionate to the respective tax liens thereon."

We find that under §378.29, F. S., (being the general law upon the question) the tax assessor and collector is to be paid compensation "*at such rates or charges as are provided by law in respect to similar services or charges in other cases*," for assessing and collecting flood control district taxes. Section 3, Ch. 25270, Laws of 1949, (being a special or local act creating and establishing the Central and Southern Florida Flood Control District) provides compensation for assessing and collecting the flood control district

taxes of said district "*at the same rates as apply to county taxes.*" By reference to §193.65, F. S., we find that certain rates are set for assessing "county general taxes," and collecting "the county taxes." Provision is also made in said section for assessing and collecting "taxing district" taxes. Chapter 25270, Laws of 1949, became a law and effective on *June 10, 1949*, while Ch. 25209, Laws of 1949 (from which Ch. 378, F. S., was derived), became a law on *June 2, 1949*.

It was held in *Rawls v. Nolan*, 98 Fla. 103, 122 So. 222, that special tax school district taxes and Florida Inland Navigation District taxes were not "county taxes," but were district taxes. It was stated in this case that the term "county taxes," as used in the statute then under consideration, does "not include district taxes of any nature." A subsequent special act will control over a prior general act relating to the same subject matter (50 C. J. 936, §546; 50 Am. Jr. 564 and 567, §§563 and 565; *State v. Emerson*, 126 Fla. 576, 171 So. 663, text 665; *City of Hialeah v. State*, 126 Fla. 306, 174 So. 843, text 849). It, therefore, appears that the above question should be answered by stating that the compensation is that provided by §193.65, F. S., for the assessment and collection of "county taxes" as distinguished from district taxes. That is, the compensation is 10% on the first five thousand dollars assessed or collected, 5% on the next five thousand dollars assessed or collected, etc., as provided in and by said section. This seems to answer the above question.

May 15, 1951—051-113.

PROPERTY TAXES—MILLAGE LIMITATION—AGRICULTURAL AND LIVESTOCK FUNDS

QUESTION: 1. Does Madison county, Florida, have authority to levy a tax of three mills on the dollar of taxable property in the county for the agriculture and livestock fund?

To: *Honorable T. C. Merchant, State Representative, House Chamber, CAPITOL:*

In the absence of applicable special or local acts §193.32, F. S., is applicable; under this section the county is authorized to levy an ad valorem tax "for agriculture and livestock fund, *not more than one-half mill on the dollar.*"

The question is, therefore, answered in the negative.

June 7, 1951—051-149.

COUNTIES—TAX EQUALIZATION BOARD—INDEXING TAX ROLLS

QUESTION: Do the statutes of this state require that there be an index of the county tax roll submitted therewith to the county board of tax equalization for purposes of tax equalization?

To: *Honorable C. M. Gay, State Comptroller, Tallahassee, Florida:*

Section 193.22, F. S., provides in part that "the assessment book as provided by the comptroller shall contain an alphabetical index in which the assessor shall be required to indicate the name and post office address, if it can be ascertained, of each person whose

name appears upon the assessment roll, and shall indicate opposite such name as indexed, the page upon which any tax or taxes may be found to be assessed." There appears to have been no change in this provision since the adoption of Ch. 5725, Laws of 1907. "The comptroller shall prepare blank assessment rolls, which shall be forwarded to the several county assessors of taxes previous to the first day of January for each and every year." (§193.15, F.S., derived from an Act of 1907). A similar provision is contained in §200.03, F.S., and was derived from an Act of 1941. "The comptroller shall prescribe and furnish all forms to be used by the county assessors, tax collectors, clerks of the circuit courts and boards of county commissioners in assessing and collecting taxes . . ." (§192.31, F.S., derived from an Act of 1941).

"No act of omission or commission on the part of any tax assessor . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such act in the first place . . ." (§192.21, F.S.). "No assessment shall be held invalid unless suit be instituted within sixty days from the time the assessment shall become final and no sale or conveyance of real or personal property for nonpayment of taxes shall be held invalid except upon proof that the property was not subject to taxation, or that the taxes had been paid prior to sale or that the property had been redeemed . . ." (§192.21, F.S.; and similar provision in §200.02, F.S.). Section 192.21, F.S., abolished purely formal objections to tax liens and tax titles (*Overstreet v. Gordon*, 121 Fla. 180, 163 So. 477) and its purpose "was to cure certain defects in the tax assessment and collection laws theretofore found and pointed out in judicial decisions." (*Prince v. Gray*, 111 Fla. 1, 149 So. 804). Said section made the statutes relating to the procedure of taxing officials directory instead of mandatory.

Although an index to a tax roll seems to be authorized by the statutes (§193.22, F.S.) we do not think that it is a material part of the tax roll under §192.21, F.S., and we do not think that its omission will in any way affect the validity of the tax roll. If the tax assessor or the county board of tax equalizers, or both of them, feels that an index will be of benefit, we see no reason why one should not be made up, although the same is not mandatorily required under the statutes. Doubtless there will be additional expense in the making up of an index to a tax roll which may also be taken into consideration in determining whether such an index should be made up. If the index will serve no useful purpose we see no reason for going to the expense of making one up; however, this is a matter to be determined by the local officials.

August 22, 1951—051-283.

TAX ASSESSOR—EQUALIZATION BOARD—POWERS AND DUTIES

QUESTIONS: 1. What authority has a county board of tax equalization to change the valuations placed upon taxable property by the tax assessors?

2. What are the duties of the tax assessor after the tax rolls

have been reviewed and equalized by the county tax equalization board and the taxes have been equalized?

3. May a tax assessor reject the equalized valuations placed upon taxable property by the county tax equalization board where he disagrees with the said board as to the value of any particular piece or parcel of taxable property?

To: Honorable D. D. Moody, County Tax Assessor, Bunnell, Florida:

It is the primary duty of the county tax assessor to determine and fix the value of each and every piece and parcel of land in his county for purposes of ad valorem taxation. The tax assessor is required to assess all such taxable property at its full cash value (§§193.11 and 193.22, F.S.). Assessments made by the tax assessor become final unless changed in some manner recognized by law; usually by the county tax equalization board or by the courts upon proper proceedings.

Although the primary duty of fixing the valuation of taxable property for the purposes of ad valorem taxation is vested in the county tax assessor, the statutes provide a method for the review and equalization of the assessments made by the tax assessor. Under §193.25, F.S., the members of the board of county commissioners constitute the county board of tax equalization. This body sits in the nature of an appeals tribunal to review the assessments made by the tax assessor. The statute contemplates that the board of tax equalization shall have jurisdiction, upon objection by taxpayers, to review the valuations placed upon particular parcels of property by the tax assessor and make adjustments of such values if out of line with valuations placed upon other like and similar property. The statutes contemplate that the basis for assessment shall be the full cash value of the property assessed. The county board of equalization has no jurisdiction to make an assessment, their powers and duties being confined to the correction of assessments made by the tax assessor.

Should the board of tax equalization find that the valuation placed by the tax assessor on any particular piece or parcel of taxable property is not in line with that placed upon the property of the county generally the board may adjust the valuation placed upon that particular piece or parcel of land so as to make it conform to the valuation placed upon the taxable property of the county as a whole. When an objection, in the nature of an appeal from the assessment made by the tax assessor, is presented to the county board of equalization the said board has jurisdiction to examine the same, and may even take evidence as to the value of said property as compared to other parcels of taxable property as well as to the full cash value of the said property and other like and similar property, and determine whether an error has been committed by the tax assessor. Should the board find that an error has been made by the tax assessor in such assessment the same may be corrected. In adjusting the valuation between pieces or parcels of property the board of tax equalization may either raise or lower the valuations fixed by the tax assessor, whichever it finds to be necessary to equalize the valuation of all taxable property.

It being the duty of the board to equalize taxes it has no jurisdiction to assume the role of a tax assessor and ally. The board must

confine itself to equalization and not assessment. It is a known fact that persons with real estate experience often differ as to the value of a particular piece or parcel of real property. This being true it is to be expected that the tax assessor and the board of equalization may likewise differ as to the value of a particular parcel of land or other taxable property. Where there is such a difference of opinion between the tax assessor and the board of tax equalization the tax assessor is required to follow the order of the board.

Although the statutes and laws of this state accord a remedy to a taxpayer to review the correctness of an assessment of taxable property made by the tax assessor and equalized by the board of equalization, before an assessment made by the tax assessor and equalized by the board of tax equalization may be enjoined or avoided by such a proceeding the plaintiff will be required to show that the assessment so made is not in line with other like or similar property and that the assessment so made is not equitable and fair. The courts have not in recent years held an entire tax roll void. Prior to the enactment of Ch. 10040, Laws of 1925, the courts often held tax assessments, and even tax rolls invalid, because of technical omissions or commissions on the part of taxing officials; however, said chapter and subsequent laws and statutes (see §192.21, F.S.,) have abolished purely technical objections to tax assessments. The mere fact that a taxpayer and the tax assessor or board of tax equalization may disagree as to the value of a parcel of property is not grounds for avoiding the assessment; the assessment must be shown to be clearly wrong or inequitable as compared to other assessments.

Answering the above questions:

1. The county board of tax equalization has full jurisdiction to adjust and equalize the tax roll so that all assessments will be upon an equal and equitable basis; but such board has no power to make a reassessment of the tax roll or any part thereof.

2. In the absence of fraud on the part of the county board of tax equalization, or the want of jurisdiction to make a particular equalization, the tax assessor is required to accept the equalization whether he agrees with it or not.

3. The third question is also answered in our observations as to the second question.

September 5, 1951—051-305.

TAX ASSESSORS—TAX COLLECTORS—COMPENSATION— AGGREGATE TIME EARNED

QUESTION: Would the compensation paid a tax assessor or tax collector under a special or local act guaranteeing a minimum compensation be considered a part of the income of the officer concerned for the year in which received or the year in which actually earned?

To: Honorable Bryan Willis, State Auditor:

Ordinarily, all amounts paid as compensation to any tax collector or assessor are considered as part of the general income or compensation of such officer in the year in which received, rather than the year in which earned, as is specifically provided by the last sen-

tence of §193.65, F.S., which reads, in pertinent part, as follows:

"All amounts paid as compensation to any tax assessor or to any tax collector under the provisions of this or any other law shall be a part of the general income or compensation of such officer for the year in which received . . ."

This provision was first placed in the governing statutes by the 1937 legislature (Ch. 17876, Laws of 1937), which purported to make a general revision of the whole subject relative to compensation and commissions of tax assessors and tax collectors. As such, it was held by one of my predecessors in office, in an opinion rendered November 16, 1937, and with which I concur, that this revision superseded any general or special act passed prior to its enactment (see 1937-38 Biennial Report, page 91). Therefore, in so far as any special act passed prior to 1937 is concerned, it is my opinion that the general law would control and that the amounts paid a tax collector or tax assessor as compensation, whether under the general law or special act, would be considered as income for the year in which actually received. Of course, this rule may be subject to specific exceptions in unusual cases, such as in my opinion 050-99, dated February 28, 1950, copy of which is enclosed.

As to special acts passed subsequent to the original enactment of the general law, now contained in §193.65 (4), F.S., the above rule would not necessarily be applicable. In such cases, it might be necessary to determine the legislative intent in each specific instance. As a rule of thumb, however, it might be stated that unless it appears from the context of the special act that the compensation was to be considered on a different basis, the general law would apply. But where there is an inconsistency or an evident intent in the special or local law to make the general law inapplicable, then the provisions of the subsequent special act would probably govern. As an example of this, I refer to my opinion 049-576, dated December 7, 1949 (copy of which is enclosed), regarding Ch. 24259, Laws of 1947, where I ruled that it was evident that it was the intent of the legislature by this special act to provide a minimum compensation for the tax collector and tax assessor there concerned, for services rendered during 1947 and subsequent years, and that it seemed clear that compensation earned during 1946 but received in 1947, was not to be considered as compensation for the year 1947, under the terms of the special act.

In summary, then, it may be stated that compensation paid a tax assessor or collector under a special or local act guaranteeing a minimum compensation would ordinarily be considered a part of the income of the office for the year in which received, unless the special act was passed subsequent to 1937 and reveals an evident intent to make the general law inapplicable in so far as it pertains to this particular provision. In the absence of information as to which particular special act you might have in mind, the foregoing is the best answer I can give to your question.

November 14, 1951—051-410.

TAX ASSESSOR—OFFICE EXPENSES—BORROWED MONEY
—INTEREST—PAYMENT

QUESTION: May a county pay interest on money borrowed

by its tax assessor necessary to carry the operating expenses of his office until remittance is made to the tax assessor by the county commissioners?

To: Honorable C. M. Gay, State Comptroller:

I am advised by the State Auditor's office that the accepted procedure which has been followed for some years in solving the dilemma which may at times confront county tax assessors when the county temporarily has insufficient funds on hand to pay the immediate operating expenses of the tax assessor's office, is for the tax assessor to arrange for a short-term personal loan to be used solely for the operating expenses of his office and to repay the principal and interest of said loan from the excess fees of the office. In other words, this procedure would, in effect, be the same as if the tax assessor advanced the necessary operating expenses of his office from his own personal funds and was later repaid by the county, except that the interest charges made by a bank would necessarily constitute a part of the expense incurred. I know of no specific prohibition against this procedure and it would appear to be a reasonable and acceptable solution to the problem. It is my opinion, therefore, that if a genuine emergency actually exists such practice is permitted and your question is answered accordingly.

I would like to point out, however, that there is no statutory authority for this procedure and that it is authorized only by a departmental interpretation of the State Auditor's office as being the only reasonable solution to an otherwise insoluble dilemma. It would appear to me that if the provisions of §193.67, F.S., were strictly followed by the county, there would be small likelihood for the need for an emergency method of financing such as this.

May 18, 1951—051-127.

TAX EXEMPTIONS—NEW INDUSTRIES COMING TO STATE

QUESTIONS: 1. May the legislature of this state, without express constitutional authority and by an act of local application, provide tax exemption or reduction to tax payers establishing new industries within this state or a county therein?

2. May the legislature by an act of local or special application provide that the improvements placed upon real property within this state by a new industry coming within this state shall not be considered as adding any value to the said lands for a period of ten years or other designated time?

To: Honorable Phillip D. Beall, State Senator, Senate Chamber:

Although the legislature in 1929 submitted a constitutional amendment, which was adopted at the general election in 1930, providing for tax exemption for new industries coming into this state for a period of time, that provision of the constitution expired in 1948 so that there is no longer any express authority in the legislature to grant such exemption. A similar constitutional provision (§14, Art. IX) was adopted authorizing tax exemption to motion picture studios and plants, which section has also expired. By these provisions it is evident that the legislature when it submitted the amendments was of the opinion that such exemptions could not be made available with the said amendments.

Under §16, Art. XVI, of the State Constitution, it is required that the property of all corporations . . . (with certain exceptions not here applicable) . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." "This is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by §1, Art. IX, of the State Constitution." (*Bancroft Investment Corporation v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d. 162, text 170). Under §1, Art. IX, of the State Constitution, the legislature is required to "prescribe such regulations as shall secure a just valuation of all property, both real and personal, exempting such property as may be exempted by law for municipal, education, literary, scientific, religious and charitable purposes." This list of purposes entitled to tax exemption is substantially identical with that contained in §16, Art. XVI, of the constitution, above mentioned. The power to tax does not include the power to exempt from taxation and exemptions may be granted only to those uses authorized by said §1, Art. IX, and §16, Art. XVI (see *St. Lucie Estates v. Ashley* 105 Fla. 534, 141 So. 738). Undoubtedly the legislature is without power to provide for exempting from "taxation any class of property which the constitution itself makes no provision for exempting" (*L. Maxcy, Inc., v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250, 151 So. 276). In the light of these observations concerning our constitutional provisions and the fact that the constitution at one time expressly provided for such exemptions, which provision has long since expired, we feel it very doubtful that such a tax exemption may be granted by legislative act. In this connection see *Eyers Woolen Company v. Gilsum*, N. H., 146 Atl. 511, 64 A. L. R. 1196 and the annotation thereto attached. This seems to answer the first question.

Section 193.20, F.S., provides that "for purposes of taxation all non-bearing fruit trees shall not be considered as adding any value to the land," which provision was upheld in *L. Maxcy, Inc., v. Federal Land Bank*, supra.) May the state likewise classify industrial property into property of existing or old industries and new or additional industries, and provide that in the case of new industries the necessary improvements upon their real estate shall not be considered, for the purposes of taxation, as adding any value to such real property for a period of ten years. There seems to us to be a very material difference between exempting unbearing fruit trees (because there is no income therefrom until they begin to bear) and the exempting of industrial property which is intended to be used for income producing purposes from the time the improvements become usable.

The state's power to classify property for tax purposes seems to be admitted (*Gray v. Central Florida Lumber Company*, 104 Fla. 446, 140 So. 320); however, such classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the legislative objective (*Gray v. Central Florida Lumber Company*, supra), and mere difference is not enough, under the fourteenth amendment to the federal constitution, but the classification must rest on some difference which bears reasonable and just relation to the act in respect to the classification proposed (*State v. Knott*, 135 Fla. 206, 184 So. 752).

The "just valuation" required by the constitution is not secured where the valuation of some property is higher proportionately than the valuation of other property assessed for the same purpose (*Sparkman v. State*, 71 Fla. 210, 71 So. 34; *Camp Phosphate Company v. Allen*, 77 Fla. 341, 81 So. 503). The validity of taxing acts, and whether they result in the just valuation of property, depends upon whether the taxing plan, in its practical operation, necessarily results in intentional omission of taxable property for an improper purpose (*L. Maxcy Inc., v. Federal Land Bank*, *supra*). Since the adoption of the amendment exempting homesteads to the extent of \$5,000.00 from taxation, it has been necessary to assess all property at 100 per cent of its cash value to render the tax burden uniform and equal (*Cosen Investment Company v. Overstreet*, 154 Fla. 416, 17 So. 2d. 788).

In the light of these observations we doubt that a statute providing that improvements upon lands of new industries in this state shall not be included in fixing its valuation, when like improvements of existing or old industries are required to be included in fixing similar valuations, would be constitutional and valid. The effect of such a statute would indirectly subsidize such manufacturers and be a diversion of public funds to a private purpose (see *Eyers Woolen Company v. Gilsum*, *supra*, first headnote). These observations seem to answer the second question in the negative; however, only the courts may finally answer said question.

July 14, 1952—052-215.

DOCUMENTED BOATS—EXEMPTION FROM PERSONAL PROPERTY ASSESSMENT AND TAXATION

QUESTION: Where a boat is documented under Title 46, of the U.S.C.A., is such exempt from personal property assessment and taxation?

To: *Honorable L. W. Lambert, County Tax Collector, Clearwater, Florida:*

Section 193.10, F. S., authorizes assessment and taxation of all boats. Section 200.44, F. S., exempts nonresident pleasure craft provided that upon demand of the tax assessor the owner can show a personal property tax receipt from another state covering said boat, or show that same is not taxable in his state or country of residence. In light of these two statutory provisions it seems, therefore, that all boats are taxable unless they come within the provisions of §200.44.

As to the documentation of the boat in question, it is assumed by this office that said boat was documented under Title 46, of the U.S.C.A.

Regarding the effect of such documentation, the United States Supreme Court has said that such enrollment does not exempt a boat or a ship from a personal property tax levied by the state. *Old Dominion Steamship Company v. Virginia*, 198 U.S. 309, 25 S. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100.

In *Ott v. DeBardleben Coal Corporation*, 166 Fed. 2d. 509, Cert. denied 68 S. Ct. 1529-1533, 92 L. Ed. 778, where state taxation

of tow boats and barges was in question the Court of Appeals sets out certain legal principles involving state taxation on ships and boats. The Court herein said:

"The fact that none of the watercraft owned by American, Mississippi, and DeBardleben has been within the State of the owners' domicile, does not of itself control the right of that State to tax the property. *Tangible personal property which has not acquired a tax situs elsewhere may be taxed by the State of the owner's domicile although it has never been brought within that State's boundaries.* Southern Pacific Co. v. Kentucky, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96. That no tax has been assessed by the State of the owner's domicile has no bearing upon the right of another State to tax. *It is only when the tangible personal property has acquired a tax situs within a State other than the owner's domicile that it may be taxed there.* Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257; Old Dominion S.S. Co. v. Virginia, 198 U.S. 299, 25 S. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100."

In Arundel Corporation v. Sprove, 136 Fla. 167, 186 So. 681, the Florida Supreme Court stated the general rule regarding personal property assessment in taxation of vessels engaged in state or interstate commerce. The Court in this case said a vessel may be taxed at its home port, at the domicile of the owner and also without reference to either of these it may be assessed when it is put to such use as would impress it with a local character.

From these decisions, and from our statutes, it seems relatively clear that a boat may be assessed for the purposes of taxation either at the domicile of the owner, when such vessel is used primarily in intra-state commerce, or when situated at home port for an estimated period of time providing that such vessel does not come within the terms of §200.44. The fact that the boat is documented is not material in this connection.

TAX SALE CERTIFICATES AND TAX DEEDS

January 11, 1951—051-11.

MUNICIPALITIES—TAX SALE CERTIFICATES— CANCELLATIONS

QUESTION: Are tax sale certificates which were issued prior to 1940 by municipalities and which are now held by the municipalities, cancellable by virtue of §194.59, F. S.?

To: Honorable Jess Mathas, Clerk of the Circuit Court, Volusia County, DeLand, Florida:

In my opinion, §194.59 (1) (2), F. S., was not intended to apply to tax sale certificates held by municipalities since the wording of the statute refers to those certificates held by "any private holder."

August 14, 1951—051-272.

MURPHY ACT LANDS—EMINENT DOMAIN—PRO- CEEDINGS IN FEDERAL COURTS—TAX SALES RECORDS—NOTATION

QUESTION: Where Murphy Act lands are taken, by eminent

domain proceedings in the Federal courts, by the United States or one of its duly authorized agencies, what manner of notation should be made upon the tax sale records and the tax sale certificates which form the basis for the State's title under the said Murphy Act?

To: Trustees Internal Improvement Fund, CAPITOL:

When the fee title to lands in this State is taken by the Federal government, or one of its duly authorized agencies, the right and interest of the State in and to any Murphy Act lands included in said proceeding are cut off by the proceeding and the State's title is transferred to the Federal government, or its agency, upon the payment of the award for the taking of the lands in question. The fact that the State, by reason of prior claims or liens held by others, takes no part of the said compensation makes no difference in the transfer of the said title. Under the decisions of the State and Federal courts construing the Murphy Act, municipalities and drainage districts whose tax liens were equal in dignity have a prior claim to the proceeds of such proceedings as to Murphy Act lands. In some instances the drainage districts have received the entire compensation with the State taking nothing.

Tax sale certificates belonging to the State and within the purview of the Murphy Act evidence the State's title (§§192.38 and 194.64, F. S.), and are not cancelled by the transfer of the State's Murphy Act title. The eminent domain proceeding does not cancel the State's Murphy Act title but merely transfers it to the Federal government or its duly authorized agency. The lien of the tax sale certificate was merged with the title under the Murphy Act and the tax sale certificate became the State's evidence of title.

We, therefore, feel that the proper method is not a cancellation of the tax sale certificate but the Trustees of the Internal Improvement Fund should make an entry on their records, and the Clerk of the Circuit Court should make an entry upon the tax sale records, indicating that the State's title was transferred, by the eminent domain proceeding, to the Federal government. The following entry is suggested: "Title transferred to Federal government by eminent domain proceeding, see 742-Miami-Civil."

INTANGIBLE PERSONAL PROPERTY TAXATION

May 24, 1951—051-136.

INTANGIBLE PERSONAL PROPERTY TAXES—LIFE INSURANCE—INSTALLMENTS

QUESTION: Where an insured died with certain life insurance upon his life, in which his wife was named as beneficiary and his brother named as contingent beneficiary, with power in the wife, should she survive the brother, to elect either to take the income from the insurance proceeds left with the insurer during her lifetime, or to take stipulated monthly installments payable from the fund during her lifetime, with remainder over to her nominee. She elected to receive the monthly installments payable from the interest and principal left with the insurer. Are these installments, or any part of them, subject to taxation under Ch. 199, F.S.?

To: Honorable C. M. Gay, State Comptroller:

The request for opinion and the file furnished us with it shows that the decedent held seven policies of life insurance upon his own life at the time of his death, in which he had made provision for his wife, *first* so long as his brother, named as contingent beneficiary, should live, and *second* after the death of the brother should the wife survive him. The brother is now dead and the wife has elected the second provision made in the policies for payment of the proceeds of the policies. Under the provisions of the policies, as elected by the wife and as is now being made, the wife receives, during her lifetime, stipulated monthly payments which are payable from interest and principal. In other words the wife is to receive stipulated monthly payments, from principal and interest, during her lifetime, with the unpaid remainder to be paid to others as stipulated in the policies. The wife does not own the principal and cannot demand payment of the same to her other than by installments as above. In effect the wife has an annuity, payable in installments and in sums certain, during the remainder of her life. The policies provide a minimum number of installments and provide that should the said minimum number not be paid to the wife during her lifetime that they shall be paid to the contingent beneficiary.

Under the constitution of this state real property, tangible personal property and intangible personal property may be subjected to taxation "excepting such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes" (§1, Art. IX) and exempting income (§11, Art. IX), and other exemptions not here material. "Unless expressly exempted from taxation, all real and personal property in this state, and all personal property belonging to persons residing in this state, shall be subject to taxation in the manner provided by law." (§192.01, F.S.). "Intangible personal property belonging to the State of Florida, or any political subdivision thereof, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." (§199.02 (5), F.S.) The property here involved does not come within any of these exemptions. Although the proceeds (§222.13, F.S.) and cash surrender value (§222.14, F.S.) of life insurance policies are exempt from execution, we find nothing in the statutes exempting them from intangible personal property taxing statutes. There is nothing in the file indicating that the insurance in question represents the wife's dower interest therein, as was the case in *Milam v. Davis*, 97 Fla. 916, 123 So. 668; and we know of no constitutional or statutory provision exempting the property acquired by a wife under the dower statutes from taxation. If the beneficiary is a widow she might claim tax exemption to the value of five hundred dollars in taxable value of some property; the claim might be exercised as to intangible personal property at her election, but if claimed as to intangible personal property it could not be applied to other property where the rate of taxation would be much higher. If the right to the installments in question is a property right it would seem to be intangible personal property subject to taxation unless expressly exempted.

Intangible personal property is defined, by our intangible personal property taxing statutes, as "all personal property which is

not in itself intrinsically valuable, but which derives its chief value from that which it represents" (§199.01, F.S.). Under §199.02, F.S., intangible personal property is divided into four classes; however, we do not feel that the right to receive the installments above mentioned falls within either of the classes designated as "A", "B" or "C". The property, if subject to taxation, would be within class "D", which includes all intangible personal property not within the other three classes. The right in question seems to be a valuable one to the beneficiary, and appears to be property within the usually accepted sense (Black's Dictionary; Rouvier's Law Dictionary; 42 Am. Jur. 188, §3; 50 C. J. 729, §2). "The amount of a policy of insurance on the life of a person who died before the day as of which the tax is assessed, although proof of death has not been made, so that the amount of the policy is not presently payable, and a claim under a fire insurance policy after the destruction of the property, although payment depends upon whether there has been a breach of the conditions of the policy and whether proof of loss is made, are both subject to taxation" (51 Am. Jur. 447, §428). In *Commonwealth v. Biesel*, 338 Pa. 519, 13 A. 2d. 419, it was held that the proceeds of a life insurance policy payable to the beneficiary in monthly installments aggregating the amount of the policy, with interest, are taxable to the beneficiary under a statute providing taxation of "accounts bearing interest." In this state an annuity is subject to our intangible personal property taxes (1933-4 Biennial Report 59; 1939-40 Biennial Report 471; 1941-2 Biennial Report 204; *Wood v. Ford*, Fla. 3 So. 2d. 490) except in so far as the annuity may represent income from the fund from which it is to be paid or from which derived (*Mahan v. Lummus*, 160 Fla. 505, 35 So. 2d. 725; *Wood v. Ford*, supra). Where annuities are made subject to ad valorem taxes, rights to receive installment payments under insurance contracts have usually been held subject to taxation (see Annotations in 150 A. L. R. 794 and 167 A. L. R. 1054).

We have examined the cases of *Button v. Hikes*, 296 Ky. 163, 176 S. W. 2d. 112; *Tax Commissioners v. Holliday*, 150 Ind. 216, 49 N. E. 14; *Laub v. Furnas County*, 104 Neb. 402, 177 N. W. 749; *Re. Taxation of Life Insurance*, 4 Pa. Dist. R. 780, 17 Pa. Co. Ct. 183; *Tax Supervisors v. Helm*, 297 Ky. 803, 181 S. W. 2d. 452; *Cooper v. Board of Review*, 207 Ill. 472, 69 N. E. 878; *Tally v. Brown*, 146 Iowa 360, 125 N. W. 248; *Commonwealth vs. Beisel*, supra, *Commissioners v. Myers*, 348 P. 90, 34 A. 2d. 69; *Freiberg v. Tax Commission*, 21 Ohio Ops. 413, 7 Ohio Supp. 103, 70 Ohio App. 229, 44 N. E. 2d. 475; *Bowman v. Tax Commission*, 135 Ohio St. 295, 20 N. E. 2d. 916; *Wilkin v. Oklahoma County*, 77 Okla. 88, 186 P. 474, and other cases, relating to the taxation of the proceeds of life insurance contracts and annuities derived therefrom, and find a sharp conflict in the applicable authorities; however, it appears that several of these cases involved general taxing statutes and not statutes expressly applicable to intangibles as a class. As to the right to tax annuities see 61 C. J. 203, §178; *Wood v. Ford*, 148 Fla. 66, 3 So. 2d. 490; *Mahan v. Lummus*, 160 Fla. 505, 35 So. 2d. 725).

In the light of the above and foregoing authorities we feel that the property in question, in so far as the installments do not represent income upon the corpus of the fund with the insurance company, is subject to taxation under Ch. 199, F.S. The person receiving the installment payments does not appear to be entitled to any

part of the corpus of the fund other than what may be payable in the installment payments. It seems that the value of the right to receive such payments (deducting the portion of each payment representing income from the fund) must be ascertained by determining the present value of the right. Doubtless the determination of such present value will present difficulties and problems and it may under some circumstances be impossible of determination; however, this is the problem of the tax assessors in fixing the values of such rights. The above question is, therefore, answered conditionally in the affirmative.

TANGIBLE PERSONAL PROPERTY TAXATION

January 24, 1952—052-18.

TANGIBLE PERSONAL PROPERTY—EXEMPTIONS—BOATS

QUESTION: Are boats to be considered personal property for the purpose of taxation?

To: Honorable Hugh C. Barce, Tax Assessor, Citrus County, Inverness, Florida:

Section 192.03, F. S., provides that for the purpose of taxation, personal property shall be construed to include, among other things, *boats and vessels*, (see also §200.01, F.S.), and are required to be listed for assessment and taxation in the county in which the same may belong. (§193.10, F. S.)

Section 200.44, F. S., provides that all yachts and boats of nonresident ownership which are enrolled, registered, or licensed at ports in states or countries other than the state of Florida are exempt from the payment of personal property taxes levied by the state of Florida upon yachts and boats. The nonresident owner claiming this exemption in this section is required to show to the Tax Assessor that taxes on said yacht or boat have been paid in state or country of residence.

Although a boat may be registered in some other state, it may acquire taxable situs in this state (*Bush v. State*, 191 So. 515); however, such boats as pay a tax in the state where registered are exempt from taxation in this state. (See AGO 049-218)

April 5, 1951—051-76.

TAX ASSESSMENTS—DREDGING EQUIPMENT, BARGES, BOATS, DRAG-LINES—SITUS

QUESTION: Where a corporation engaged in dredging and similar work in one of the several counties of this state, has its principle place of business in another county where its vessels requiring registration are registered, but maintains several pieces of equipment in the county wherein dredging work is being carried out, in which of the said counties is such personal property subject to taxation?

To: Honorable C. M. Gay, State Comptroller:

In order to determine this question it will be necessary for us to examine and construe several provisions of our statutes. It

appears that we are concerned with certain dredging boats and equipment presumed to have been located in Martin County, Florida, on January 1, 1950. Goods, chattels, boats, vessels, vehicles (except motor vehicles), animals and other articles of value capable of manual possession is subject to taxation in this state as tangible personal property (§200.01, F.S.). It is the duty of each owner of tangible personal property subject to taxation in this state "to return the same for taxation to the county assessor of taxes in the proper county." (§200.08, F.S.). Where a taxpayer has tangible personal property, subject to taxation, in more than one county he is required to make separate tax returns in each and every county (§200.09, F.S.). In making up the tangible personal property tax rolls the tax assessor is required to "enter upon said roll all taxable tangible personal property usually kept and located in the county" (§200.13, F.S.). "All real and personal property shall be subject to taxation on the first day of January of each year" (§192.04, F.S.).

Although there is considerable authority that "as between taxing units within the state, tangible personal property is ordinarily taxable to the owner in the county . . . in which the owner has domicile, if the property has not acquired a taxable situs elsewhere" (51 Am. Jur. 466, §451; 61 C. J. 520, §635 "the modern rule is that the actual situs of visible tangible personal property and not the domicile of the owner determines the place of taxation" (51 Am. Jur. 467, §452; 61 C. J. 520, §635) unless otherwise provided by statute. "An essential and indispensable feature of the power of taxation is that either the owner of the property be a resident, or the property be situated within the district attempting to exercise the power to tax" (State v. Gay, 160 Fla. 445, 35 So. 2d 403, text 410). "The general rule is that the situs of personal property, for the purpose of taxation, is primarily at the domicile of the owner, subject to certain exceptions, such as the acquisition of a fixed status different from that of the owner" (Atlantic Coast Line Railroad Company v. Amos, 94 Fla. 588, 115 So. 315, text 320).

"All persons owning steamboats, dredge boats, sailing vessels, wharf boats, barges and other craft shall be required to list the same in the county in which the same may belong or be enrolled, registered or licensed" (§193.10, F.S.). This section seems to give the owner of vessels the election of returning the same for taxation either in the county where they belong or in the county where enrolled, registered or licensed. Although this statute has origin of 1895, we do not think that it is in conflict with anything in Ch. 200, F.S., which had an origin of 1941 or later, therefore, we do not think that it was repealed by the subsequent legislation.

It appears from the records in the office of the Secretary of State that the corporation in question is a Florida corporation with its principal place of business in Hillsborough County. From the above and foregoing authority it seems that under the statutes the owner of vessels used in dredging, which are enrolled, registered or licensed, may elect to return such vessels for taxation in the county of enrollment, registration or license, or in the county of their situs. When the owner elects to return such vessels for taxation in the county or enrollment or registration the

assessor of the county of their situs should not place them on his tax roll.

The owner of such property returning it for taxation in a county other than that in which it is situate should advise the tax assessor of the county of its situs that return has been made in the other county. All property used in such dredging work not subject to classification as vessels subject to enrollment or registration would seem to be subject to taxation in the county where situate. These observations seem to answer the above question.

May 28, 1951—051-140.

PROPERTY—NONRESIDENT OWNER—LESSEE— TAX WARRANT

QUESTION: Where tangible personal property leased by and in the possession of a resident of one of the counties of this state, but owned by a resident of another county of this state, is assessed on the tax roll of the county wherein located in the name of the lessee, against whom may a tax warrant be issued for the collection of the taxes against such property, when the said property is no longer within the county where assessed?

To: Honorable C. M. Gay, State Comptroller:

Although tax returns are required by persons having the control, custody or management of tangible personal property, as well as by the owner thereof, (§200.08, F. S.) provision is made for assessing tangible personal property subject to taxation which has not been returned (§200.05, F. S.). Although generally the tax roll should show a general description of the property taxed, its full cash value and the name of its owner (§§200.04 and 200.06, F. S.) there is provision for assessing such property when its owner is unknown (§200.13, F. S.). Any error of the tax assessor in assessing tangible personal property, as to the name of the owner or person against whom assessed, would not seem to void the assessment, at least when not objected to before the tax roll becomes final (§200.02, F. S.). Under this section acts of omission or of commission do not void the assessment. We are advised of no reason why the property in question was not subject to taxation in the county where assessed. We assume that the tax assessor was justified in placing it on the tax roll, although he may have made an error in stating the name of its owner.

Although there may have been an error in stating the name of the taxpayer, the error appears to have been one of omission or commission, which act "of omission or commission may be corrected at any time by the officer or party responsible for the same . . . and when so corrected they shall be construed as valid ab initio and shall in no way affect any process by law for the enforcement of the collection of any such tax." (§200.02, F. S.). If there was an error made in the tax assessment in question in naming the taxpayer in the said assessment it is recommended that the same be corrected as is provided in said §200.02, F. S.

Tangible personal property taxes are due and payable on November the first of the tax year (§200.25, F. S.) and become delinquent on "the first day of April of the year following that

for which the assessment was made," and warrants are required to be issued for their collection if not paid by the first of May following (§200.26, F.S.). "In case any tangible personal property upon which the taxes shall have been assessed is removed from the county in which said tangible personal property was assessed, it shall be lawful for the tax collector of the county, by his warrant, to authorize the sheriff of the county within which such tangible personal property shall have been removed to collect such taxes, and the sheriff may proceed thereon as upon execution from the circuit court." (§200.30, F.S.).

"It shall be the duty of the tax collector issuing a tax warrant for the collection of delinquent tangible personal property taxes to continue from time to time his efforts to collect same for a period of seven years from the date of the issuance of such warrant." (§200.33, F.S.). This section seems to be in the nature of a limitation upon the tax warrant.

With regard to the above question the tax assessor should correct the assessment by inserting the name of the owner instead of that of the lessee as the taxpayer (see §200.02, F.S.) after which the tax collector should issue a tax warrant for the amount of the tax (§200.30, F.S.) and deliver it to the sheriff of the proper county for enforcement. The warrant should be enforced as an execution at law.

December 20, 1951—051-474.

NONRESIDENT BANKS—CUSTOMERS' OBLIGATIONS— ASSIGNMENTS—TAXABLE SITUS

QUESTION: Where a retailer in this state sells auto supplies and other merchandise and receives from its customers deferred payment obligations secured by conditional sales agreements or otherwise, which are assigned or negotiated to nonresident banks, for a valuable consideration, is such intangible personal property subject to taxation under Ch. 199, F.S.?

To: *Honorable C. M. Gay, State Comptroller:*

It appears from your file furnished us with the above request for opinion that the retailer, in its regular course of business "acquires deferred payment obligations arising from the sale of merchandise . . . to various purchasers . . . which obligations are payable in . . . installments, and are evidenced and secured by conditional sales contracts or other title retention or lien instruments or evidenced by promissory notes secured by chattel mortgages . . ." Under the agreement between the retailer and the said banks title to the said instruments pass to the banks, either by endorsement, assignment, or otherwise, although actual possession may remain with the retailer for the purposes of collection as the agent of the said banks. The transfer of negotiable instruments seems to be without recourse upon the retailer as endorser. It also appears from the purchase agreement between the retailer and the banks in question that all such obligations sold to the said banks shall be assigned, transferred and set over to the Chase National Bank of the City of New York, as agent for all of the purchasing banks according to their interest therein. The said Chase National Bank seems

to hold the said obligations in the nature of a trust for the other banks or as agent for them. We, therefore, think that, under the agreement above mentioned, title to the securities and contracts in question is vested in the purchasing banks, or maybe in the Chase National Bank as trustee for itself and the other banks; in any event title does not seem to be in the said retailer. This seems to be true although the instruments themselves may have been left with the retailer merely and only for the purposes of collection and the notation thereon of payments made.

Under the above and foregoing statement of facts we are of the opinion that said assignments, endorsements, and other transfers not only vested title to the indebtednesses in the said banks but also vested in them title to the property retained by the said retailer and assigned to the said banks (see Annotation in 13 A.L.R. 1050; 55 A.L.R. 1161 and 65 A.L.R. 783). The said assignments, endorsements, and other transfers give the banks the legal status of the retailer (*Bear v. General Motors Acceptance Corporation*, 101 Fla. 913, 123 So. 817, text 821). We find nothing in the file furnished us with the request for opinion that in any way indicates that the assignments, endorsements, and other transfers, or any of them, were in the nature of a mortgage or lien only made for the purpose of securing the payment of money loaned or advanced by the banks to the retailer.

Having determined that the contracts in question and retained titles are vested in the said banks and not in the retailer, we are next confronted with the question of whether or not such property or any of it may be subject to taxation in the hands of the banks, due to the fact that such contracts appear to be within this state and not with the bank in its home state. It appears from the file that probably 78% of the said contracts is now owned by national banks with only about 22% being owned by state banks. This would seem to present an additional question of the right of this state to tax such property in the hands of national banks. We do not think that §192.54, F.S., has any application as it relates to banks organized and existing under the laws of this state only, and so far as we are advised no part of the securities are vested in a Florida banking institution. States and their political subdivisions are without power to tax the personal property of national banking associations (see opinions of this office reported in 1945-6 Biennial Report 290 and 294 and authorities therein referred to). This being true it seems that so much of the intangibles as are owned by national banks are not subject to taxation by reason of federal statutes. This leaves for further consideration the portion of the property owned by the banks not national.

"Personal property of an intangible nature, such as credits, bills receivable, bank deposits, bonds, promissory notes, mortgage loans, judgments and corporate stock, does not admit of actual location, and as to such property the maxim '*Mobilia sequuntur personam*' (movables follow the person) embodies the general principle in relation to situs for the purposes of taxation. While intangible personal property may, under given circumstances, acquire a taxable situs in a jurisdiction other than the domicile of the owner, as, for example, under the exception regarding a 'business' or 'commercial' situs, and even perhaps lose its situs in the state of the owners

domicile, the general rule of very extensive application is that the situs of intangibles, for the purposes of property taxation, is at the domicile of the owner and only there." (51 Am. Jur. 475 §463). The fact that securities are kept in a state other than that of the residence of their owner does not of itself give the state where kept the right to tax such securities (51 Am. Jur. 476, §465); there must be a business or commercial situs to permit taxation (51 Am. Jur. 479, §468). What constitutes a business situs is not a question of easy determination; it is probably largely a question of fact (51 Am. Jur. 480, §469). "Mere authority of a local agent to collect the debts and remit the proceeds to the nonresident owner is generally held not to give such credits a business situs in the state of the agent's residence, so as to subject them to property taxation there, where the agent's authority is strictly limited to the mere clarity to reinvest the proceeds. In some such cases, however, taxable situs has been deemed to exist." (51 Am. Jur. 482, §471). To the same effect see annotations in 76 A. L. R. 813 and 143 A. L. R. 379. If the use of the securities in question is merely collection and remittance to the home office of the nonresident bank we feel that there is no taxable situs in this state; but if such use extends beyond mere collection and remittance then further examination of the question would seem necessary. The question of whether intangibles have acquired a taxable situs in this state is largely one of fact surrounding their use in this state.

These observations seem to answer the above question as well as the same may be generally answered.

EXCISE TAX ON DOCUMENTS

December 6, 1951—051-444.

WRITTEN INSTRUMENTS—DOCUMENTARY STAMPS

QUESTION: Is a written instrument in the nature of a Bond for Title to real estate which obligates a purchaser upon the fulfillment of certain conditions to buy and a seller to sell a tract of land, subject to the imposition of the documentary stamp tax provided for by Chapter 201, Florida Statutes, and upon what consideration is the tax computed?

To: Honorable C. M. Gay, State Comptroller:

The specimen of contract submitted with your question is in the nature of what is known to the law as a Bond for Title, under which one party agrees to buy and the other party agrees to sell certain real estate upon their mutual compliance with certain conditions and obligations. The contract acknowledges receipt of a part of the purchase price fixed upon the property and provides for the payment of the balance of the consideration upon the performance of the conditions. Under the law of Florida, and generally of other jurisdictions, the instrument is held to create an equitable title in the real estate designated in the contract and an estate in the purchaser which is indefeasible except upon conditions breached.

Section 201.02, F.S., provides for the imposition of an excise tax on deeds, instruments or writings whereby any lands, tenements or other realty, or any interest therein, shall be granted, sold, transferred or otherwise conveyed or vested in the purchaser. The estate

created in the purchaser under the terms of the contract submitted is an interest in lands within the terms of the statute, and the writing is accordingly subject to the tax. The cited section of the statutes further provides that the tax shall be computed at the rate of 10¢ per \$100.00 of the consideration therefor. The subject written instrument discloses that the consideration paid by the purchaser for the equitable interest and estate in the lands purchased vested in him by the Bond for Title, is the amount of money paid at the time of the execution of the contract, the balance of the purchase price to be paid upon the performance of the conditions imposed and the conveyance of the legal title to the lands.

Reference is made to official opinion rendered on September 4th, 1951, designated as 051-295, wherein a related question was considered with respect to the nature of the interest of a purchaser acquired under a Bond for Title or a written undertaking to convey.

Instruments in the nature of the specimen submitted are subject to the imposition of documentary stamp tax under the provisions of Ch. 201, F.S., and the amount of the tax is lawfully computed at the statutory rate upon the amount of money paid by the purchaser at the time of the execution of the writing creating the equitable estate in the lands.

LICENSE TAXES

January 3, 1952—052-2.

PLASMATIC PHYSICIANS—PRACTICE—LICENSES—QUALIFICATIONS

QUESTION: Does §205.051, F.S., have any application to applicants for occupational licenses to practice as plasmatic physicians in this State?

To: *Honorable C. M. Gay, State Comptroller:*

Said §205.051, F.S., provides that it "shall be unlawful for the tax collectors of the several counties of the State of Florida to issue state and county occupational licenses to any person applying for a license to practice medicine in any of its branches unless and until proof of current qualification and competency, as established by certificate or license issued by State Board duly constituted and legally authorized to determine qualification and competency, be exhibited at the time of making such application." Under this statute if practice by a plasmatic physician is regulated by any of the statutes of this state then qualification thereunder would seem to be required as a condition to the obtaining of an occupational license under Ch. 205, Florida Statutes.

It appears from your file, handed us with the request for opinion, that the applicant "gives treatment by electricity for arthritis and rheumatism, using electrical machines, and does not do any massaging. He further advises that he does not prescribe any medicines or diagnose any cases." The word "plasmatic" is defined in the medical dictionary as "pertaining to or of the nature of the plasma." It also appears from the said dictionary that there are several kinds of plasma, including blood plasma and lymph plasma. A person is deemed to practice medicine in this state "who holds

himself out as being able to diagnose, *treat*, operate, or prescribe for any human disease, pain, injury, deformity, or physical condition, or who shall offer or undertake, *by any means or method*, to diagnose, *treat*, operate or prescribe for any human disease, pain, injury, deformity or physical condition" (§458.13, F.S.). Both arthritis and rheumatism seem to be either a disease or physical condition. "The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing or alleviating disease or pain" (70 C. J. S. 815, §1). The use of electricity in the treatment of diseases and disorders of the human body has in several cases been held to constitute the practice of medicine. (Annotation in 115 A. L. R. 957-962).

Under the above observations of the applicant for an occupational license in treating either a condition of the plasmas of the human body, or a disease or physical condition of the human body, with electricity, he should either be required to submit proof to the tax collector that he is duly licensed as a practitioner of one of the healing arts, or display a certificate from the state board of medical examiners or a member thereof that the treatments being given by him do not constitute the practice of medicine, or submit other proof, satisfactory to the tax collector, that his treatments do not constitute the practice of medicine as above defined.

February 21, 1952—052-48.

LICENSES—MEDICINE SHOWS—CLASSIFICATION

QUESTION: What is the proper occupational or other license to be required of operators of "medicine shows" and similar performances?

To: Honorable C. M. Gay, State Comptroller:

The term "medicine shows" seems to be a means of using exhibitions, music, singing, performances, acting and other forms of entertainment to cause a crowd to collect with the purpose and intention of exercising salesmanship on them and persuading them to purchase patent medicines and remedies. The purpose of the show is to cause a crowd to collect and not to collect an admission fee or other compensation. The compensation for putting on the show is derived through the sale of medicines and remedies and not by admissions. The usual medicine show is put on for the entertainment of any person who may choose to stop and see and hear the same and there is no requirement that he pay any admission fee or buy any medicine, remedy or other thing of value. In so far as the spectators are concerned the show is free, and if they are able to resist the salesmanship of the person selling the medicine the show costs them nothing. We have no statute similar to the Mississippi statute involved in *Hass v. State*, 107 Miss. 439, 65 So. 502, which was evidently aimed at persons using "medicine shows" and similar entertainment for the purpose of selling medicines.

Although we are of the opinion that such medicine shows are within the intent and purview of §205.31, F.S., so that a permit for their operation should be procured from the state comptroller, we do not think that they come within the purview of §§205.32, 205.33, 205.60 or 205.61, F.S., as each of said sections seems to base the license fee upon an admission or similar charge.

Although the license tax may be based upon "every side show, exhibition, display, concert, athletic contest, lecture, minstrel, or performance to which admission is charged, a fee is collected or a charge is made for anything of value, "we do not think that the sale of medicine in connection with such shows is within the said statutory provision. Although a charge is made for the medicine its purchase is not made a condition for attending the show. The show is free to all who may care to come and attend. Of course if a fee or charge is made, or something is required to be purchased, as a condition for attending the show then it would be within said §205.60, F.S.

The person selling the medicine would be trading in tangible personal property so as to be subject to §205.59, F.S. The operation of the "medicine show" by the person selling the medicine, although operated as a free show, would seem to be "the operation of a business of such nature that no license can properly be required of it under any other section of this chapter," so as to be subject to the provisions and requirement of §205.49, F.S. The business of the medicine show is to produce prospective customers for the purchase of the medicine or remedy to be sold in connection with the show. The license tax under said §205.49, F.S., is not dependent upon the charging of any admission or other fee. These observations seem to answer the above stated question.

March 3, 1952—052-60.

"HOSTESSES"—TAKING ORDERS—SALES—LICENSES

QUESTION: Where nonresident manufacturers or dealers, selling kitchen and table ware, obtain the services of local "hostesses," who invite a number of ladies for a demonstration meal, at which time the said hostess takes orders for the purchase of such kitchen and table ware and sends the same to such manufacturer or dealer, who fills such orders and sends them to the said hostess for delivery to the purchasers and collection of the purchase price, is such hostess, under these circumstances, subject to a license tax in this State?

To: *Honorable C. M. Gay, State Comptroller:*

We are advised by your said request for opinion that no advance payments are collected by the said hostess as a condition to sending in the orders. This request for opinion was probably based upon the case of *Dorsett v. Overstreet*, as Tax Collector, 154 Fla. 566, 18 So. 2d 759, 155 A. L. R. 228, where a broker "selling in several south Florida counties the products of manufacturers he selects," was held subject to an occupational license tax. In this case the broker maintained no stock of goods, but exhibited samples to prospective customers and took orders for future delivery to them. "Other than his samples his equipment consisted of office furniture." The concerns he patronized had their principal places of business outside of the State of Florida. Where the same merchandise could be obtained from more than one dealer the broker selected the one from which the goods would be ordered. In this case it seems that the broker was not acting as the agent of any particular dealer but had discretion as to which one of the several represented by him the order would be sent to. In this case the orders were sent direct

to the purchaser, by the dealer, and it does not appear that the broker had anything further to do with it after taking the order and sending it to the dealer. Under the facts in this case it was held that the said broker was transacting a brokerage business in Florida and was subject to the license tax provided for by §205.59, F.S.

The decisions are clear that under the Commerce Clause of the Federal Constitution a state may not tax interstate commerce if the tax amounts to a direct burden on such commerce. Great confusion has arisen among court decisions as to what constitutes a burden on interstate commerce, and the application of the rule is far from easy. Section 205.59, F.S., provides that "every person engaged in the business of trading, buying, bartering, serving or selling tangible personal property as owner, agent, broker or otherwise, shall pay a license tax of ten dollars . . .". The statute is broad enough in its scope to include "hostess". However, the decisive point is whether or not the transaction covered by the question makes the individual a "broker" and not merely a "solicitor" or "saleswoman".

The facts presently under consideration do not seem to us to constitute the "hostess", a broker within the purview of the case of *Dorsett vs. Overstreet*, supra. She represents a single firm, has no office and does not do a "local business". It was definitely stated in the leading case of *Nippert vs. City of Richmond*, 327 U. S. 416, 66 S.Ct. 586, 90 L. Ed. 760, 162 A.L.R. 844, that a "local incident" may not be made the "focus of the tax". In the *Nippert* case an ordinance of the City of Richmond was held invalid which placed the identical tax on local solicitors, as distinguished from nonresident solicitors, for the reason that it discriminated against interstate commerce in favor of local competing business. However, the *Nippert* case does point out that in determining whether a given license imposes an undue burden on interstate commerce it is proper to consider that it is proposed by a municipality rather than a state, therefore, potentially imposing a multiple rather than a single burden. The *Nippert* case was decided subsequent to *Dorsett vs. Overstreet*, supra, and casts a grave doubt upon that decision, although there is a difference in the factual situations. The decision in the *Nippert* case was based upon the rule of the so called "drummer cases." Whether the merchandise is shipped direct to the person or to an agent for delivery apparently has no bearing upon the question of the right to tax (162 A.L.R., 865, 866). In either case the tax may not be levied.

All considered, I do not believe the so called "hostess" you have described falls within the scope of the case of *Dorsett vs. Overstreet*, supra, but rather she is a solicitor, and as such is engaged entirely in interstate commerce, and not subject to occupational license tax.

Hence, the question is answered in the negative.

September 7, 1951—051-309.

PLUMBING CONTRACTORS—LICENSES—BOND

QUESTION: Should applicants for state and county occupational licenses as plumbing contractors be required to show that the bond prescribed by §3 of Ch. 26904, Laws of 1951, has been obtained before the licenses are issued?

To: Honorable C. M. Gay, State Comptroller:

While failure to comply with any of the provisions of Ch. 26904, Laws of 1951, is made a misdemeanor by virtue of §12 of the act, §3 also has the effect of establishing a mandatory requirement that the prescribed bond be given prior to obtaining a state or county occupational license as a plumbing contractor. Thus, it appears that the giving of such bond is a necessary prerequisite to obtaining a license, and in my opinion the issuing authority should require that such bond be posted prior to issuing the license.

I do not believe that it would be necessary for the applicant to present a formal certificate to evidence the posting of the bond. An affirmative statement by the applicant that such bond had been posted would appear sufficient, since the statute provides that the bond shall be filed with the clerk of the circuit court and the issuing authority could readily ascertain by checking with the clerk's office that such bond had been posted before issuing the license.

It is my opinion that the giving of the surety bond prescribed by Ch. 26904, Laws of 1951, is a prerequisite to obtaining a state and county occupational license as a plumbing contractor, and that the license issuing authority should ascertain that such bond has been posted prior to issuing such a license. Your question is answered accordingly.

May 16, 1952—052-157.

LICENSES—SALESMAN ORDERS—INTERSTATE SHIPMENT OF SHOES

QUESTION: Where a citizen and resident of this State is engaged in exhibiting shoes and other merchandise offered for sale by a nonresident merchant and taking orders, from residents of this State, for the purchase of such shoes and merchandise, which orders are forwarded to such nonresident merchant for acceptance and delivery of the merchandise ordered, is such salesman of this State required to obtain an occupational license in this State?

To: Honorable C. M. Gay, State Comptroller:

From the facts reflected by your file furnished us with the request for opinion it seems that the salesman in question is acting as salesman or agent for one merchant or manufacturer with its principal place of business in another state; that the sales are made by samples, catalogue, or other means, through the taking of orders from the purchaser to the seller for the sale and purchase of the merchandise, which orders are sent to the home office of the seller for acceptance or rejection, and when accepted the orders are delivered by public carrier to the purchaser usually cash on delivery. The salesman collects an initial deposit which is probably his compensation as salesman. Whether the salesman has any duties other than the taking of the order, receiving the deposit and transmitting the order to the seller does not appear from the record; therefore, we shall presume that such are his duties.

Under our statutes persons "engaged in the business of trading, buying, bartering, or selling tangible personal property as owner, agent, broker, or otherwise" are required to obtain a state and coun-

ty occupational license (§205.59, F.S.) as is every person engaged in the practice of a profession (§205.52, F.S.). Where any person is engaged in a business not otherwise classified under the statute he is also required to obtain a license for that business (§205.49, F.S.). If the salesman is required to obtain an occupational license he must be classified within one of the above statutes. There is no doubt that the completed transaction is one of interstate commerce; this being true interstate commerce by necessity enters into the case. (Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511; Nippert v. Richmond, 327 U. S. 52, 71 L. Ed. 534; Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed. 573; Stewart v. Michigan, 232 U. S. 665, 58 L. Ed. 786; Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 69 L. Ed. 982).

Our own courts have held taxing statutes inapplicable or invalid where similar facts were involved (Cason v. Quinby, 60 Fla. 35, 53 So. 741; Wilk v. Bartow, 86 Fla. 186, 97 So. 307; Myers v. Miami, 100 Fla. 1537, 131 So. 375; but see Dorsett v. Overstreet, 154 Fla. 566, 18 So. 2d. 759). In the Dorsett v. Overstreet case the person taking orders was not acting as the exclusive salesman of a particular seller, but was acting more in the nature of a broker than a salesman for a particular seller. Under either §§205.49, 205.52 or 205.59, F.S., the license tax is a flat sum without regard to the business done by the salesman or other person. If either of said statutes are applicable to the person in question the same license tax is required whether a single order or a thousand orders are taken for interstate shipment. Although the statutes may be said to be applicable to both intrastate and interstate commerce, the very nature of the difference between the two "taken in conjunction with the inherent character of the tax, makes equality of application, as between the two classes of commerce, generally speaking impossible." (see Nippert v. Richmond, 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760, text 769).

On re-examination of our opinion of March 3, 1952 (052-60) we find no reason to depart from it and it is hereby reaffirmed.

The above question is answered in the negative.

July 2, 1952—52-207.

TRADING STAMP COMPANY—LICENSE TAXES— CLASSIFICATION

QUESTION: Where a trading stamp company supplies trading stamps and books to various retail merchants and said stamps are given to such merchants' customers and thereafter redeemed by the customers in the office of the trading stamp company, what occupational license tax is the trading stamp company subject to under the Florida Statutes?

To: Honorable C. M. Gay, State Comptroller:

There are two Florida statutes which may be applicable. The first is §205.59, which provides for an occupational license tax of \$10.00 a year for dealing in tangible personal property. The second is §205.49, which provides an occupational license tax of \$100.00 a year on all business which cannot be properly regulated under any other provision of Ch. 205, F.S.

The business of dealing in trading stamps cannot be clearly ascertained in regard to its property classification. In only a few instances has any court attempted to so classify it. It is difficult to do so for the reason that it involves many transactions and the property involved changes its qualities as the stamp moves throughout the entire process. This situation has led a Federal Court to call these stamps "sui generis". That is to say, that such stamps are peculiar in their own right and that they constitute an exclusive classification of property.

The case referred to is *Sperry and Hutchinson Company v. Mechanics Clothing Company*, 135 F. 833 (1904). There it was stated:

"A 'trading stamp' is not ordinarily property. It is sui generis . . . A stamp is not merely a token of the company's obligation to redeem it, and of the right of the holder to redemption, but it is a token of an instrument of another transaction in which the trading stamp company has an interest, and from which it derives its entire profit and its recompense for its outlay in establishing the business."

The case of *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 60 L. Ed. 679 (1916) arose from the defendant appellee contesting the trading stamp tax passed by the Florida Legislature in 1913, which was repealed by the Legislature in 1937. The court there said, "the use of coupons, etc., was an entirely legitimate method of advertising."

It is my opinion that a trading stamp company cannot be properly regulated as dealing in tangible personal property under §205.59, F.S., but is running an advertising business for which there is no specific statute covering it for the purposes of occupational license taxes. Hence, the trading stamp company should pay the license tax provided for in §205.49, F.S.

October 27, 1952—052-297.

MERCHANDISE—TRADING STAMPS AND COUPONS

QUESTION: Where the manufacturer or distributor of merchandise packs therewith, attaches thereto or otherwise furnishes therewith one or more coupons or stamps that may be used to obtain, or in connection with the obtaining, of merchandise, either at a so called premium store or at a regularly licensed store of some nature, what occupational license should be required in connection with the above use of trading stamps or coupons?

To: Honorable C. M. Gay, State Comptroller:

It has been the practice of many manufacturers or distributors of merchandise (such as coffee, soap and soap products, and many other items of merchandise) to include in or on their packages or containers of merchandise, or otherwise include therewith, trading stamps or coupons valuable in the purchase of items of merchandise, usually through established premium stores or premium departments in duly licensed stores operated by themselves or under arrangements with others. Sometimes these trading stamps or coupons may be exchanged for merchandise without further considera-

tion, other times the said stamps or coupons may be used in partial payment of such items of merchandise. In other words the said stamps or coupons are used to pay for, or as part payment for, the merchandise desired by the holders of such stamps and coupons. In areas where separate premium stores are maintained the holders of such stamps or coupons may go to such stores and select items, in the same manner as one might select items in stores generally, but the same may be purchased in whole or in part with such stamps or coupons instead of cash. It, therefore, seems that merchandise in such premium stores are in effect purchased with such stamps and coupons instead of cash; the stamps and coupons are exchanged for merchandise.

The manufacturers and distributors of merchandise above mentioned use the trading stamps and coupons in question, and arrange for their redemption, not as a separate business but as an incident to their regular business. It might be said that the use of such stamps and coupons is in the nature of advertisement. We are not here dealing with an organization having as its stock in trade a trading stamp business, in which it goes from business operator to business operator and sells or attempts to sell such business on the use of its trading stamps or coupons as a means of advertising their business. With these businesses sometimes the trading stamp business arranges for their redemption, while at other times only the stamps and coupons are sold to the business men who are left to arrange for the redemption of such stamps and coupons. In the case of the manufacturers or distributors of coffee, soap and soap products and other items of merchandise the use of the trading stamps and coupons is an incident to their business but in the case of persons furnishing trading stamps and coupons, as referred to above in this paragraph, trading stamps and coupons is their business.

We are inclined to view the so called premium stores, whether they confine the purchase of premiums exclusively with trading stamps or coupons or permit a partial use of such stamps and coupons with a cash payment, as being engaged in the business of selling tangible personal property and therefore within the purview and intent of §205.59, F.S. There is some indication in your file that it may be "public service" within §205.53, F.S.; with this we disagree as we see no element of public service as contemplated by said §205.53. Whether or not the use or distribution of trading stamps and their redemption is to be classified as an incident to a business or as a separate business within itself is usually a question of fact to be determined in each particular case. We do not consider this opinion in conflict with our opinion of July 2, 1952 (052-207).

July 16, 1951—051-213.

LIQUEFIED PETROLEUM GAS DEALERS— LICENSE EXEMPTION

QUESTION: Is the exemption provided by §205.16, F. S., applicable to the licenses required of liquefied petroleum gas dealers under §526.13, F. S.?

To: *Honorable J. Edwin Larson, State Treasurer:*

Section 205.16, F. S., provides a limited exemption from license taxes "on any license to engage in any business or occupation in the

State of Florida which may be carried on mainly through the personal efforts of the licensee as a means of livelihood . . ." This tax exemption is not all inclusive (*Scott v. Worthington*, 145 Fla. 461, 199 So. 766) and was held not to extend to licenses against fishing boats. This section does not extend to State Hotel Commission fees (1949-50 Biennial Report 261); outdoor advertising permit fees (1949-50 Biennial Report 262); fees of the State Board of Dispensing Opticians (1949-50 Biennial Report 268); dance hall licenses under Section 205.37, Florida Statutes (1947-8 Biennial Report 269); fees of insurance agents and solicitors (1945-6 Biennial Report 349); cigarette permits issued under the cigarette taxing laws (1945-6 Biennial Report 369); fees required of funeral directors (1945-6 Biennial Report 584). It, therefore, appears that the exemption granted by Section 205.16, Florida Statutes is applicable only to the ordinary occupational licenses assessed and collected for general state, county and municipal purposes. The said section is not applicable to regulatory fees or licenses taxes not coming within the purview of the said section; which being an exemption statute should be strictly construed in favor of the State.

Under §526.13, F. S., provision is made for the granting of licenses to dealers in liquefied petroleum gases and equipment, as well as manufacture of such equipment, which licenses carry license fees ranging from \$10.00 to \$35.00 per annum. Section 526.19, F. S., provided an appropriation for the enforcement of Ch. 526, F. S., in the sum of \$15,000.00 per annum. The expenses for enforcement are now paid from the general revenue fund under the general appropriations act of 1951, as they were under the 1949 act. The income from the licenses required under §526.13, F. S., have been \$7,762.50 for the 1947-48 fiscal year, \$11,207.50 for the 1948-9 fiscal year, \$9,192.50 for the 1949-50 fiscal year and \$12,435 for the 1950-51 fiscal year. Ch. 526, F. S., appears to be regulatory in its intent and purpose and to have been adopted under the police powers of the State. Although the license fees are paid into the general revenue fund of the State we feel that they were intended to raise funds for the enforcement of the said act. In no fiscal year have the license taxes collected equaled the appropriation made in the original law of \$15,000.00 for enforcement.

Having concluded that the license fees provided by §526.13, F. S., were for enforcement purposes and not revenue producing we feel that the above question should be answered in the negative.

October 15, 1952—052-292.

MUNICIPALITIES—LICENSE TAXES—EXEMPTIONS

QUESTION: Whether or not a municipality may legally charge a license tax from an individual engaged in business within the corporate limits of a municipality who, in every respect, comes within the provisions of §205.15, and is exempt from the payment of state and county license taxes?

To: Honorable Kenneth E. Cooksey, Attorney, Town of Monticello, Monticello, Florida:

The applicable portion in question, of §205.15, F. S., provides:

"All confirmed cripples, deaf and dumb persons, or invalids physically incapable of manual labor, widows with

minor dependents, and persons sixty-five years of age or older, with not more than one employee, or helper, and who use their own capital only, not in excess of five hundred dollars shall be allowed to engage in any business or occupation in counties in which they live without being required to pay for a license; . . ."

Uncertainty arises from the language used in this statute as to whether it means exemption from county license taxes or exemption from both county and municipal license taxes. The quoted statute must be, therefore, construed in light of other sections of Ch. 205, F. S.

Chapter 205, as expressed in §205.01, provides for the issuance of business, professional and occupational license taxes by the state and counties, as required by the chapter or other laws of the state. Section 205.02, F. S., provides that a county license tax of 50% of the state license tax can be levied and imposed on every business, profession and occupation, and further specifically provides that

" . . . provided, that incorporated cities and towns may impose such further license taxes of the same kind upon the same subjects as they may deem proper, except when otherwise provided by law, but the license taxes so imposed shall not exceed fifty per cent of the state license tax, except as otherwise authorized by law."

Therefore, if the persons enumerated in §205.15 are exempt from state and county license taxes, a municipality may not levy a business, professional or occupational license tax upon the same persons, because §205.02 authorizes the municipalities of the state only to levy such license taxes of the same kind upon the same subject as can the state and county, except as otherwise provided by law.

Section 205.15 was enacted into law as §27 of Ch. 20956, Laws of 1941. That portion of §39 of Ch. 20956 designated as "Section 2" provides that "all laws and parts of laws in conflict herein are hereby repealed." It can be said it was the intent of the Legislature in the enactment of Ch. 20956 to establish a state policy on matters contained in said chapter. Persons who are cripples, deaf and dumb persons, or invalids physically incapable of manual labor, widows with minor dependents, and persons sixty-five years of age or older are at a distinct disadvantage, due to their physical handicaps and incapacities, in providing a livelihood for themselves. It is the apparent intent of the Legislature, in the enactment of §205.15, to establish a state policy to exempt such persons from all state, county and municipal license taxes in the encouragement to such persons in the attempt to make a livelihood for themselves so that they will be self independent and not be a burden on the state, county or municipality.

In the absence of a special act or charter provision, which exempts the municipality from the provisions of §205.15, F. S., by permitting it to levy occupational license taxes regardless of physical condition or age, the town is not permitted to levy such license taxes. By reason of your not having called our attention to any special act or charter provision touching upon the question, we

assume there is none. Based upon this assumption, the question is accordingly answered in the negative.

September 27, 1951—051-338.

CLINICS—NONRESIDENT CONCERN—AGENTS— SALE OF TRUSSES—LICENSES

QUESTIONS: 1. What license or licenses are necessary for an agent representing an out of state concern who holds clinics with respect to the treatment for rupture?

2. Is such an agent required to conform to the basic sciences law and other laws with respect to the practice of healing arts?

To: Honorable C. M. Gay, State Comptroller:

It appears from the facts supplied us that the expert who is conducting the hernia clinics is in fact an agent of an out of state concern who makes his living from the sale of trusses. If he sells trusses at these clinics and makes delivery at that time he will be subject to a license under §205.59, F. S., as he will be considered to be trading in tangible personal property. *Dorsett v. Overstreet*, 154 Fla. 566, 18 So. 2d. 759, 155 A. L. R. 228.

However, if he only takes orders for the trusses and they are shipped from the home office of the concern C. O. D. to customers and the concern pays the hernia expert a commission, it has been held that these are interstate commerce commission transactions which cannot be burdened by taxation. Note in 155 A. L. R. 248.

We are considering here a man who is an expert in his field. He is qualified by study and experience to properly fit trusses and give comfort and relief to the pains of hernia. Due to the specialized nature of his work he comes within the scope of §205.52, F. S., and as such is required to secure an occupational license. The foregoing answers your first question.

An agent who conducts clinics and fits trusses is not engaged in the practice of medicine as defined by §458.13, F. S., which provides:

"This chapter shall not be construed to affect . . . any person or manufacturer who without the use of drugs or medicines mechanically fits or sells lenses, artificial eyes, limbs or other apparatus or appliances."

This means that such an agent though a trained expert in his field would not be subject to the basic sciences law or other laws with respect to the practice of healing arts. This answers your second question.

March 8, 1951—051-48.

DISABLED VETERAN'S BARBER SHOP—MUNICIPAL EXEMPTIONS

QUESTIONS: 1. Whether a veteran claiming 30 per cent disability is entitled to municipal exemption from an occupational license on a barber shop in which he himself works and has two employees?

2. The license fee is \$5.00 per chair and this veteran was offered exemption on his own personal chair but was not offered exemption on the other two chairs. Please advise whether he is entitled to complete exemption for the shop or only for his own individual chair.

To: Honorable Wilson L. Bailey, City Attorney, Blountstown, Calhoun County, Florida:

Assuming that the veteran in question has exhibited a certificate of government rated disability to an extent of ten per cent or more as provided in §205.16, F. S., your first question is answered in the affirmative.

I understand your second question to mean that the license fee in question is on the operation of the shop itself and not on each individual barber. In other words, the license is on a graduated basis depending on the number of chairs operated in the shop. If this is the case, I am of the opinion that the veteran would be entitled to an exemption up to \$50.00 on his license fee for operating the shop regardless of the size of the shop or how many barber chairs he operated.

August 20, 1951—051-282.

MUNICIPALITIES—DISABLED VETERANS—SEPARATE OCCUPATIONAL LICENSES

QUESTION: Where a municipality in this State requires a separate occupational license of persons operating a filling station and of persons operating a taxi cab business, to what exemption, under §205.16 or 205.161, F. S., will a disabled war veteran be entitled to, who operates a filling station and a taxi cab in connection therewith?

To: Honorable Ira C. Haycock, Attorney, City of Homestead, Miami, Florida:

Section 205.16, F. S., (as well as §205.161) clearly provides for exemption from municipal taxes when applicable. In order to be entitled to the exemption provided by said sections of the statutes the applicant must (1) be a bona fide permanent resident of this State and a qualified elector, (2) must be a disabled war veteran, who served in the armed forces of the United States in time of war, (3) must have been honorably discharged from the said armed forces, (4) must at the time of his application for exemption, "be disabled from performing manual labor, and (5) must be engaging in a business or occupation in this state "which may be carried on mainly through the personal efforts of the licensee as a means of livelihood." This right to exemption extends to and includes "the right of licensee to operate an automobile for hire not exceeding five-passenger capacity, including the driver, when it shall be made to appear that such automobile is bona fide owned, or contracted to be purchased, by the licensee, and is being operated by him as a means of livelihood," provided the motor vehicle license fees have been paid by the licensee.

One of the main requirements is that the business or occupation engaged in must be one "which may be carried on mainly

through the personal efforts of the licensee as a means of livelihood." Doubtless this statute was designed to aid in the rehabilitation of disabled war veterans and to enable them to become self-supporting. The Legislature doubtless had in mind the small businesses that may be operated through the personal efforts of one person, a person unable to perform manual labor as the term is generally and usually understood. The term "business" itself may be of many different constructions and meaning. A store selling men's shirts, underwear, or other single item of men's wear would be a business, as is also a store selling all kinds and types of men's furnishings, even should we extend our thoughts to a large department store selling all kinds and types of merchandise, we still have a business, although involving many departments. Doubtless in many instances the general business of a large department store might be divided into many smaller businesses; however, the large department store is a business and not a group of several separate businesses. In many instances the operation of a single business may require several types of occupational licenses.

We, therefore, feel that the Legislature intended to extend the exemption to the business of the disabled veteran and not to single occupational licenses. Where more than one license is required for the operation of a single business a credit, on the gross amount of the several licenses, up to and including fifty dollars is granted by the exemption. It has been held by this office several times that the exemption may not be applied to more than one business venture of the veteran (1929-30 Biennial Report 181; 1931-2 Biennial Report 772). The statute does not appear to prevent the employment of others by the veteran (1949-50 Biennial Report 264); however, even if other persons are employed by the veteran the business must be one carried on mainly through the efforts of the war veteran. We doubt that the direction of a large business employing many persons who are depended upon to perform the services necessary would qualify the business for exemption from a license. The main operation of the business must be carried on through the personal efforts of the licensee; although employees may aid and assist in the operation of the said business. The operation of a single taxi cab by a veteran is clearly within the statute, but we doubt that the operation of a large fleet of taxi cabs would be. The business of the operation of the single taxi cab may be carried on through the personal efforts of the licensee, but were there a large fleet the main part of the business would of necessity be carried on by others.

Whether or not a filling station operator who also operates a taxi cab would be engaging in only one business within the purview of said §§205.16 or 205.161, F. S., (although more than one license was required) would be, at least in part, a question of fact. The size of the operations of the filling station and of the taxi cab business and whether or not they were such as they may both be operated through the personal efforts of a single person would be material. Doubtless the Legislature contemplated that a veteran have such a business as will permit him to be self-supporting. If the combined operation of the filling station and the taxi cab was necessary for the veteran to make a livelihood this fact should be taken into consideration in determining the question.

October 24, 1951—051-375.

EXEMPTIONS—RETIRED DISABLED VETERANS

QUESTION: Is a veteran who has been retired from active service because of physical disability entitled to the license tax exemptions provided by §205.16, F.S.?

To: Honorable Edward L. Semple, City Attorney, City of Coral Gables, Miami, Florida:

It is my opinion that it was the intent of the legislature to give a broad interpretation to the words "honorably discharged" as used in §205.16 in providing certain exemptions to veterans who are disabled.

Although there are technical distinctions used in specifying the various methods by which servicemen are released from active service, I do not believe that the legislature intended to limit the exemption in question to individuals who have severed all further connection with the armed services.

If such were the case, all members of the reserve units of the various branches of the armed forces would be precluded from the exemption in question since they are in reality only released to inactive duty rather than discharged from the service.

In my opinion, the section in question was intended to apply to all members of the armed forces who have been released to inactive duty under honorable conditions. This would include members of the reserve and individuals who have retired either because of age or disability.

Your question is therefore answered in the affirmative.

October 26, 1951—051-390.

EXEMPTIONS—DISABLED VETERANS

QUESTIONS: 1. Under the provisions of §205.16, F.S., which grants occupational license tax exemptions to certain disabled veterans, must the occupation for which the exemption is sought require manual labor on the part of the licensee?

2. Must the occupation to be engaged in by the veteran be his only means of livelihood in order to warrant the tax exemption under §205.16?

To: Honorable Neil E. MacMillan, City Attorney, Delray Beach, Florida:

Section 205.16, F.S., provides a \$50 license tax exemption on occupational licenses for disabled veterans of the Spanish American and World Wars who meet certain qualifications. Among the requirements that must be fulfilled are that the veteran "at the time of his application for license as hereinafter mentioned shall be disabled from performing manual labor" and that the business or occupation to be engaged in is one "which may be carried on mainly through the personal efforts of the licensee as a means of livelihood."

From a reading of the entire law, it seems clear that it was the purpose of the legislature to grant occupational license tax exemptions to those war veterans who are disabled to the extent that they cannot perform manual labor. It would hardly be logical, then, to construe the act to say that the occupation for which the tax exemption is given be one that requires manual labor, since such a construction would defeat the whole purpose of the law. It would certainly lead to an absurd result if the law were interpreted to mean that an occupational license tax exemption could only be granted to veterans for those occupations which they are presumably disabled from engaging in! Your first question is therefore answered in the negative.

As to your second question, an examination of the law indicates an intent on the part of the legislature to prevent a disabled veteran from taking advantage of the exemption provided by acting as a "front" for a business which he does not operate himself, or in which he is not primarily interested, since the portion of the statute quoted above provides that the occupation for which the license is sought must be one "which may be carried on mainly through the personal efforts of the licensee as a means of livelihood." However, I see nothing in the act which requires that the occupation be the *only* means of livelihood of the veteran, so long as the veteran devotes his personal attention to the business or occupation and is primarily interested in such endeavor. The fact that the disabled veteran may also receive income from other sources, or may actively be engaged in other ventures seems to be immaterial. To view the act any other light would require that each time an application for exemption were received it would be necessary to investigate the applicant's financial status and determine that he does not receive a living income from any other source. Such, I am sure, was not the intent of the legislature.

Assuming all other requirements are met, if the occupation for which license tax exemption is applied for is one in which the veteran is primarily interested and is one which will be operated by the disabled veteran himself through his own personal efforts, the exemption would be warranted, despite the fact that such veteran might also receive income from other sources.

MOTOR FUELS, ETC.; REGULATION; DISTRIBUTORS; OTHER PERSONS

March 30, 1951—051-73.

GASOLINE AND LIKE PRODUCTS—DISTRIBUTORS, QUALIFICATIONS

QUESTIONS: Can the following qualify as distributors?

1. Any person, association of persons, firm or corporation that purchases gasoline within this state from a duly qualified distributor in this state and resells it through one or more filling stations owned by the person, association of persons, firm or corporation.

2. Any person, association of persons, firm or corporation that purchases gasoline within this state from a duly qualified dis-

tributor in this state and resells the gasoline to filling stations not owned by the person, association of persons, firm or corporation.

3. Any person, association of persons, firm or corporation that purchases gasoline within this state from a duly qualified distributor in this state and resells one part of the gasoline through filling stations owned by the person, association of persons, firm or corporation, and the second part to filling stations not owned by the person, association of persons, firm or corporation.

To: The Honorable C. M. Gay, State Comptroller:

Through subsequent conversations with your office it seems that the purpose of the above request is to determine whether certain persons dealing in gasoline in this state may qualify as "distributors" under Ch. 207, F.S., and collect and pay the taxes imposed by Ch. 208, F.S., as a dealer under the terms of said statutes. Section 207.01 (5), F.S., gives several definitions of the term "distributor" as used in said statutes. The term seems to have the following variations:

1. A person "that imports or causes to be imported and sells at wholesale, retail or otherwise within state" gasoline and like products.

2. A person "that imports or causes to be imported and withdraws for use within this state, by himself or others, any such fuels from the tank car, truck or other original container or package in which imported into this state.

3. A person "that manufactures, refines, produces or compounds any such fuels within state, and sells the same at wholesale or retail or otherwise within this state for use or consumption within this state.

4. A person who shall import into this state from any other state or foreign country, or shall receive by any means into this state, and keep in storage in this state for a period of twenty-four hours or more after the same shall lose its interstate character as a shipment in interstate commerce, any motor fuel which is intended to be used for consumption in this state.

5. "All persons primarily liable under the motor fuel tax laws of this state for the payment of motor fuel taxes."

From the above statute it seems clear that before a person may be deemed to be a "distributor" of gasoline and like products he must be (1) either an importer of such fuels, (2) a manufacturer, refiner, producer or compounder of such fuels within this state, or (3) shall be primarily liable for the payment of the taxes upon the motor fuels sold by him. Under each of the subsections in the above question, it appears that the person, firm or corporation in question, in each instance and under each circumstance, "purchases gasoline within this state from a duly qualified distributor within this state" so that he may not be classified as an importer of the same. There is no evidence that he manufactures, refines, produces or compounds the same within this state. This seems to leave only the question of whether or not such person,

firm or corporation is "primarily liable for the payment of the taxes upon the motor fuels sold by him."

Under §208.04, F.S., a tax is imposed upon the sale or transfer of certain motor fuels within this state. Although this ultimately falls upon the consumer the statutes require that it "shall be paid upon the *first sale* or transfer within this state, whether by distributor or dealer" and such distributor or dealer acts "as agent for the state in the collection of said tax whether he be the ultimate seller or not." Under §208.17, F.S., the tax imposed upon gasoline and like products "shall be collected only once and then upon the first sale after the same has lost its interstate character." Under these statutes it is clear that the tax is payable by the person making the first sale or transfer of gasoline and like products in this state after the same is brought into this state or is manufactured within this state.

Under these statutes the "duly qualified distributor" making the sale to the purchaser mentioned in the several subsections of the above question is the "distributor" within the purview of the statutes and the one required to collect and remit the tax. The "purchaser" mentioned in the said question does not seem to qualify as a distributor under the purview of the said statutes. The above question is therefore answered in the negative as to each of its subsections.

December 12, 1952—052-326.

MOTOR FUELS—DISTRIBUTORS—LICENSES —CANCELLATION

QUESTION: In the light of an opinion of the Attorney General rendered on March 30, 1951 (051-73) upon the question of who may qualify as distributors of motor fuels under Ch. 207 and 208, F.S., should the State Comptroller cancel licenses issued prior to the date of said opinion where the licensee does not import the motor fuels sold by him but purchases the same within this state from an importer or refiner thereof?

To: Honorable C. M. Gay, State Comptroller:

Chapter 207, F.S. provides for the licensing of distributors of motor fuels within the State of Florida and makes it unlawful for an unlicensed person to engage in the business of a distributor of motor fuels in this State unless and until he is so licensed (§§207.02-207.06, F.S.). A distributor of motor fuels is defined in §207.01, F.S. from which "statute it seems clear that before a person may be deemed to be a 'distributor' of gasoline and like products he must be (1) either an importer of such fuels, (2) a manufacturer, refiner, producer or compounder of such fuels within this state, or (3) shall be primarily liable for the payment of the taxes upon the motor fuels sold by him." (Opinion of March 30, 1951; 051-73). The first and second of the above subdivisions as to who are distributors seems clear; however, the third subdivision may need further consideration.

Gasoline excise taxes imposed by Ch. 208, F. S., are required to be "paid upon the first sale or transfer within this state whether by a distributor or dealer . ." (§208.04, F.S.), and are subject to

collection "only once and then upon the first sale after the same has lost its interstate character." (§208.17, F.S.) Under these statutes it seems that the person making the first sale (either at wholesale or retail) after the gasoline has lost its interstate character, or after it has been manufactured, refined, produced or compounded within this state, is the one primarily liable for the tax under the motor fuel taxing laws.

"Distributors" of motor fuels, the licensing of whom are provided for in Ch. 207, F.S. are confined to those who import motor fuels into this State, those who manufacture, refine, produce and compound motor fuels in this State, and those who make the first sale, either at wholesale or retail, within this state. For most practical purposes we may say that they are those persons who make the first sale of the motor fuels within this state, either at wholesale or retail. Persons who purchase gasoline within this state, either from an importer, manufacturer, refiner, producer or compounder, do not qualify as distributors under the above statutes; in such cases the tax is due and payable by the person *making the first sale*, whether he be an importer, manufacturer, refiner, producer, compounder or otherwise. Ch. 207, F. S. originated in the laws of this state as Ch. 16082, Laws of 1933. No amendments have been made in this law with regard to the licensing of distributors, or with regard to the definitions of the term "distributor" since its enactment. Ch. 208, F.S. originated in the laws of this state as Ch. 15659, Laws of Florida, Laws of 1931, §11 of which provided that the tax "shall be collected only once and then upon the first sale after the same has lost its interstate character" (see §208.17, F.S.). It, therefore, appears that the rule announced by this office in its opinion of March 30, 1951, (051-73) has been the law in this state at least since Ch. 16082, Laws of Florida, Laws of 1933.

The questions posed by you seems to indicate that certain persons who do not make the first sale of gasoline within this state hold licenses as distributors under Ch. 207, F.S.; we find no provisions in the statutes authorizing or permitting the licensing of such persons under Ch. 207, F.S. It may be that such licenses or some of them may have been properly issued to persons making the first sale of motor fuels within this State but who have ceased to make such first sales; under these circumstances it would seem that such persons have ceased to be "distributors" within the purview and meaning of said Ch. 207. This would seem to suggest two classes of licensed "distributors" who do not qualify as such under the statutes: (1) those persons properly licensed in the first instance but who have ceased to be distributors within the purview of the statutes, and (2) those persons who have never been distributors within the purview of said statutes. Without regard to these two classes of outstanding licenses the taxes on gasoline and like products (under Ch. 208, F.S.) should be enforced *against the first sale (at either wholesale or retail) of such gasoline and like products in this State*, whether by importer, manufacturer, refiner, producer, compounder or otherwise. The person making such first sale should be required to pay the tax as required by law. The mere fact that a person may be licensed as a distributor under Ch. 207, F.S. does not permit him to collect and remit the taxes unless his sales are the first sales of the products subject to taxation within this State.

All importers, manufacturers, refiners, producers, compounders, and others making first sales in this State should be notified that they shall make collection of the tax on all such products sold by them in this State without regard to whether the person purchasing the same (at either wholesale or retail) holds a license under Ch. 207, F.S. or not. The licenses in question would seem to be void and without effect where the holder thereof makes no *first sales within the state* as above described, and are effective only where the holders thereof make such first sales. Although the comptroller would seem to be justified in giving notice of cancellation of such licenses we doubt that such cancellation is required by law; the requirement of the law is complied with when the tax is enforced *against the first sale within the state*. Notice should be sent to the holders of such licenses that *only first sales within this state* are within the operation of such licenses and that where they purchase the taxable products within this State that they will be required to pay the tax to the seller from which their purchase is made.

TAXES ON GASOLINE AND LIKE PRODUCTS

July 9, 1951—051-202.

GASOLINE TAXES—DEALERS—DEDUCTIONS

QUESTIONS: 1. Should the deductions "allowed to the dealer on account of services and expenses in complying with the provisions of" the gasoline taxing statutes be applied to gasoline taxes assessed under §§208.06, 208.22 and 208.23, F.S., only, or should they be extended to the gas taxes levied and assessed by §208.44, F.S., also?

2. What effect have the provisions of §16, Art. IX, of the State Constitution, upon the above mentioned allowance to gasoline dealers on account of services and expenses?

To: Honorable C. M. Gay, State Comptroller:

Section 208.06, F.S., as amended by 26796, Laws of 1951, provides that "the tax levied and assessed as provided in §208.04," F.S., shall be paid to the State Comptroller as therein provided. However, the said statute as amended further provides that "the dealer shall deduct, from the amount of tax shown by the report to be payable in an amount equivalent to two per cent of the tax on motor fuel not exceeding five hundred thousand taxable gallons, and less an amount equivalent to one per cent of the tax on motor fuels in excess of five hundred thousand (500,000) gallons but not exceeding one million taxable gallons, which is hereby allowed to the dealer on account of services and expenses in complying with the provisions of this act . . ." Section 208.24, F.S., as amended by said Ch. 26796, contains a similar provision for deductions as to taxes collected under §§208.22 and 208.23, F.S. The provisions for deductions are set out in both of the above amended sections in substantially the same language. No reference is made to the taxes collected under §208.44, F.S. The deductions appear to be specific as to the sections above mentioned. They do not appear to be of such nature as to be considered general; if the reference in either section would have been sufficient without repeating substantially the same language in the other section.

It is, therefore, our conclusion that no deductions may be made as to the gasoline taxes levied and assessed pursuant to §208.44, F.S., or the seventh gas tax. The statutory reference in said §§208.06 and 208.24, as amended, are to the so-called six cent gas tax. This answers the first question; except in so far as the same may be affected by the second question or §16, Art. IX, of the State Constitution.

Under §16, Art. IX, of the State Constitution, "the proceeds of two (2c) cents per gallon of the total tax levied by state law upon gasoline and other like products of petroleum, *now known as the second gas tax* . . . shall as collected be placed . . . in the 'State Road Distribution Fund' in the State Treasury" to be administered as provided in and by the said section. The Legislature is without power to reduce this tax by statute. Without regard to what the total tax may be this two cents, without any reduction therein, must be deposited as required by said constitutional provision. The said two cents per gallon does not seem to be separately levied by the State Constitution, but is taken from the taxes otherwise levied by law. Under the Constitution the Legislature probably cannot reduce the total gasoline tax below this two cents mentioned in the State Constitution.

Although the Legislature has no power to reduce this two cents tax we see no reason why it may not, from gasoline taxes generally and over and above the said two cents, allow a reduction in the overall tax for the services and expenses of the dealer. The compensation here seems to be based on the overall tax of six cents, in which is included the two cents controlled by the Constitution. We know of no constitutional provision prohibiting the deduction in question to the dealer so long as sufficient funds remain for the payment of the said two cents gas tax under the State Constitution. These observations seem to answer the second question.

The allowance to the dealer is based on the six cents gas taxes and not on the seventh cent gas tax and the deductions should be made upon this basis and without regard to the two cents tax pledged under the State Constitution.

TAX ON MOTOR FUELS OTHER THAN GASOLINE

July 12, 1951—051-210.

TAXATION—LIABILITY—MOTOR FUELS— PUBLIC HIGHWAYS—MAINTENANCE

QUESTION: What is the nature of the taxes imposed by Ch. 209, F. S., as amended by Ch. 26718, Acts of 1951, and upon whom does the tax ultimately fall?

To: General Service Administration, Office of the Regional Counsel, Atlanta, Georgia:

The intent and purpose of Ch. 209, F. S., as amended by Ch. 26718, Laws of 1951, which became effective on July 1, 1951, is to impose an excise tax upon motor fuels not subject to taxation under Ch. 208, F. S., when such motor fuels are intended for use to propel motor vehicles over the highways of Florida. The said statutes as amended were imposed "for the purpose of providing

revenue to be used by this State to defray, in whole or in part, the cost of constructing, widening, reconstructing, maintaining, resurfacing and repairing the public highways of this State" and the cost of administering said Ch. 209. (\$209.001, F. S., as amended.)

When the original statute was enacted in 1939 there were few motor vehicles using fuels not taxable under Ch. 208, F. S.; there was, therefore, no undue burden upon such users to require that each and every of them register and pay the taxes direct. By reason of the development of motor vehicles using fuels not taxable under said Ch. 208 since 1939, there are now many such vehicles using the highways of the State; some of them located in this State and others of them coming into the State only on rare occasions, while others have regular routes in and out of this State. Because of these developments it became a burden upon many of the users of such fuel to require that each and every of them register and obtain a license to use such fuels. Because of these developments the recent Legislature provided for the licensing not only of users of such fuels but also dealers in such fuels. Under the law as amended persons using such fuels "on which the tax has been paid to a *licensed user-dealer*" are not required to be licensed under the statute. The tax in question appears to be payable "upon the transferring or delivering of" such fuels into the supply tank of any motor vehicle. "Any person using special fuels for propelling any motor vehicle over the highways of this State on which the excise tax has not been paid to a *licensed dealer* in this State" is made liable for the tax.

It clearly appears that the intent and purpose of the statute as amended was to levy a tax to compensate the State for the use of the highways by motor vehicles passing over them while using the type of fuel described in said Ch. 209, as amended. The tax is collected for the use of the highways and not as an occupational tax against the users of the motor fuel in question upon the highways of this State. It is levied to compensate the State for the use of its highways. It is a tax upon the purchaser and user of the motor fuel. (In this connection see recent opinion of the Supreme Court of this State declaring our sales taxing statutes to be a tax upon the purchaser and not upon the seller; *P. A. Mero, Sheriff v. C. E. Spencer and wife*, not yet reported.) These observations seem to answer your inquiry.

TAX ON SALES, USE AND CERTAIN TRANSACTIONS

February 16, 1951—051-31.

TANGIBLE PERSONAL PROPERTY—RESIDENTS—SALES BY NONRESIDENT FIRMS—VEHICLE SEIZURES

QUESTIONS: 1. Where residents of this State, by mail or otherwise, order tangible personal property from business firms in other states, which property is delivered in this State, to such residents by such firms, in vehicles owned and operated by such firms, are such sales subject to taxation under Ch. 212, F. S., or sales tax statutes?

2. If tangible personal property, purchased by residents of this State aforesaid, is subject to taxation under said Ch. 212, F. S.,

then are the vehicles used for the purpose of making deliveries in this State subject to seizure under §212.16, F. S.?

To: Honorable C. M. Gay, State Comptroller:

Section 212.05, F. S., declares that it is "the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who stores for use or consumption in this state any item or article of tangible personal property . . . for the exercise of said privilege a tax is levied . . . at the rate of three per cent of the sales price . . . when sold at retail in this state . . . at the rate of three per cent of the cost price . . . when the same is not sold but is used, consumed, distributed or stored for use or consumption in this state . . ." The above taxes are required to be paid by the "dealer" who may pass the tax on to the purchaser.

Section 212.06, F. S., requires that the above tax shall, as of the moment of sale (as to sales taxes) or as of the moment of purchase (as to use taxes), be collectible from the dealer. Section 212.06 (2) (a) defines the term "dealer," as to the use taxes, to mean "every person who imports or causes to be imported, tangible personal property from any state or foreign country, for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state."

Section 212.16, F. S., after providing for the issuance of permits to persons importing tangible personal property into this State subject to taxation under Ch. 212, F. S., (evidently relating to use taxes) provides that "the importation into this state of tangible personal property which is subject to tax, by truck, automobile, or other means of transportation, other than a common carrier, without having first obtained a permit as hereinabove described . . . shall be construed as an attempt to evade payment of the tax and the same is hereby prohibited and the said truck, automobile or other means of transportation . . . and the said taxable property may be seized by the comptroller . . ." This statute provides for the disposition of the vehicle after seizure.

Method of sale and delivery used.—From the record in this case it appears that persons residing in this state order tangible personal property from business firms in another state (such orders being transmitted by mail, telephone, telegraph or in person from residents of this state to such business firms), upon the receipt of such orders such business firms fill the said orders (in such other state) and deliver the same, in vehicles owned and operated by such business firms, to such residents of this State. Doubtless the acceptance of the said orders is made in such other states and not in this State. We are not advised whether payments are made in this State (upon delivery or otherwise) or in such other state. So far as we are advised the said nonresident business firm has no place of business within this State, and, being a foreign corporation, has not qualified with the Secretary of State to do business within this State. These facts and circumstances distinguish this case from cases such as *Nelson v. Sears, Roebuck & Company*, 312 U. S. 359, 61 S. Ct., 386, 85 L. Ed. 888, 132 A. L. R. 475, and *Nelson v. Montgomery Ward and Company*, 312 U. S. 373, 61 S. Ct. 593, 85 L. Ed. 897, where the said corporations either had

places of business within the State where the purchaser resided or were duly licensed to do business within such State. These cases turned upon the authority of the states to place restrictions upon the right of foreign corporations to do business within the State; the collection of the use tax was one of the conditions to generally doing business in the state where delivery was made, although the order was filled in interstate commerce in another state. The rule in these cases has no application unless the corporation selling the tangible personal property in interstate commerce is doing business in the state of delivery.

The tax levied by this State.—Our courts have held that where orders for the purchase of tangible personal property are sent from this State to a business concern in another State where such orders are filled in that state and delivered in this State, either by agents of the seller or by common carrier, the transaction is one of interstate commerce until the delivery is complete in this State and the property has come to rest (*American Mercantile Company v. Circular Advertising Company*, 71 Fla. 522, 71 So. 607; *Cason v. Quinby*, 60 Fla. 35, 53 So. 741; *Wilk v. City of Bartow*, 86 Fla. 186, 97 So. 307; *Olan Mills, Inc., v. City of Tallahassee, Fla.*, 43 So. 2d. 521; 15 C. J. 307, §27). Doubtless the Legislature knew that it was without power to place a sales tax upon the sale of tangible personal property in interstate commerce (15 C. J. S. 467, §112) and determined to place a use tax upon such property intended for use or consumption in this State. Doubtless it was the intention of the Legislature to place this tax upon the use of the property sold after it ceased to be in interstate commerce and came to rest in this State. "A nondiscriminatory tax imposed on the use of property formerly the subject of interstate commerce will be upheld, unless after importation it is used as an instrumentality of commerce (15 C. J. S. 466, §112). We, therefore, conclude that the use tax imposed by Ch. 212, F. S., is for the use of the property after it ceases to be a subject of interstate commerce. The tax appears to be levied against the user of the property although the seller or importer is required to collect the tax.

Seller doing business within this State to collect use tax.—Under the decisions of the Supreme Court of the United States in *Nelson v. Sears, Roebuck and Company*, supra, *Nelson v. Montgomery Ward and Company*, supra, and *Felt & Tarrant Manufacturing Company v. Gallagher*, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488, where a corporation in transacting business in a state, although the same may be entirely interstate, such state may require that such corporation collect use taxes for the state upon merchandise sold by it to residents of the state. Although a foreign corporation doing an interstate business into this State may transact such business without being required to obtain a license or being required to register with the Secretary of State, we do not think that it may be said that such a corporation is not transacting business within this State in this connection, at least if it is making deliveries of merchandise within this State in interstate commerce. It appears from the record that many, if not all the sales in question, are made by one or more Alabama corporations from their places of business in Alabama. It appears that the Uniform Sales Act is in force in Alabama. (Title 57, Alabama Code of 1940). There is evidence from the record in this case that the

sales agreement contemplates that the goods will be delivered in this State in vehicles of the seller (and probably at the expense of the Seller). Rule 5 of §19 of the Uniform Sales Act (§25, Title 57, Alabama Code 1940) provides that "if the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Under this statutory provision the seller is probably the "importer" into the State of Florida within the purview of the Florida Statutes. It seems probable that the foreign corporation imports the tangible personal property into this State for use or consumption within this State within the purview of §212.06, F. S.

In conclusion, although the answer is not without doubt, we feel that the above questions should be answered in the affirmative. In this connection we feel that there is sufficient authority to justify the Comptroller in attempting a collection of the taxes in question by the seizure of the vehicle used in connection with the bringing of the goods into Florida, *if such vehicles are owned and operated by the seller as is hereinabove presumed.*

March 15, 1951—051-55.

RACE TRACKS—AGREEMENTS—RENTALS OR SERVICE FEES

QUESTION: Where a race track in this state, licensed under the statutes of this state relating to horse and dog racing, utilizes certain equipment and services, including equipment used in connection with pari-mutuel betting, starting of the races and photographing of race results, for which they pay a rental or service fee, are such service fees or rentals subject to the provisions of Ch. 26319, Laws of 1949, or Ch. 212, F.S.?

To: Honorable C. M. Gay, State Comptroller:

We have been furnished with a copy of an agreement between the Automatic Totalisators, Inc., a Florida corporation, and one of the race tracks of this state wherein and whereby the totalisator company agrees to lease to the race track an automatic calculating machine and appurtenant equipment for a period of seven years. In this agreement the parties agree as follows:

"A. The company agrees to lease to the association and to install and maintain on the premises of the association on all days on which licensed racing is being conducted thereon, during the term of this agreement, a calculating machine and appurtenant equipment . . .

"B. The company further agrees to maintain the said machine and make any changes therein to keep it modernized and up to date in all ways, and to furnish trained service men and engineers, etc., and keep the equipment insured.

"C. The company guarantees and warrants the proper and efficient operation of the machines leased.

"D. The association (the race track) agrees 'to rent' the said calculating machines . . . and . . . agrees to use the same exclusively . . . and to pay the company *as rental* for the use of the calculating machine (a certain stated percent of the money wagered) . . . The amount of *rental* shall be computed on the average daily handle of each meeting . . . and adjustments shall be made in the last weeks' *rental* . . . however, no *rental* shall be payable hereunder on any day during which the association does not . . . hold races . . ."

The agreement concerning the starting gates is in the form of a letter wherein the company agrees to furnish the race track "starting gate service" under certain conditions, consisting of two gates, to be maintained in good working order, "the cost of this service is \$150.00 per each official day of racing . . ."

The agreement concerning the photo finish service is likewise in the form of a letter which service is to be furnished "for the sum of one hundred forty dollars per day." The company agrees to "furnish up to date camera equipment; also operators and photographic material necessary for the operation and completion of the pictures." The company assumes all risk for the equipment used while on the race track premises and agrees to comply with all regulations of law relating to its said business. The only thing the race track furnishes is a camera room, water and electricity.

The starting gate agreement and the agreement providing for photo finish service are clearly service contracts and not contracts for the rental of the equipment. The agreement relating to the automatic totalisators is in form a rental agreement and if it is to be considered a service contract it must be from a construction of the agreement.

The association or race track agrees to furnish necessary rooms and electricity for the machines, "to furnish at its own expense the necessary staff of ticket sellers and mutual department personnel." Although there are many features of the contract which indicate that it may have been intended as a service and not a rental contract, on the other hand, there are indications that it was intended as a rental agreement. We have reviewed the opinion of the Michigan Board of Tax Appeals, in the case of Michigan Racing Association, Inc., v. Department of Revenue, but do not think that it is convincing upon the question of the nature of the contract in question.

In the light of these observations we feel that the agreements relating to starting gates and photo finish equipment are service contracts and therefore not within the purview of Ch. 26319, Laws of 1949, as it relates to rental of tangible personal property; as to the agreement relating to the totalisator machines there is such doubt as to its nature that we feel that it should be treated as a rental agreement until determined otherwise by a court of competent jurisdiction. These observations seem to answer the above question.

May 1, 1951—051-99.

PERSONAL PROPERTY—ESTATE BY ENTIRETIES—
SALES TAX WARRANT—EXECUTION

QUESTION: May an execution, duly issued upon a sales tax

warrant pursuant to §212.15, F.S., against a married person be levied against personal property held as an estate by the entireties?

To: Honorable Todd Tucker, Sheriff, Pinellas County, Clearwater, Florida:

Estates by the entirety in personal property, as well as in real property, exist in this state (*Bailey v. Smith*, 89 Fla. 303, 103 So. 833, text 834; *White v. White*, Fla., 42 So. 2d. 710, text 711). In this state "an estate by the entirety cannot be charged with the separate debts of either spouse" (*Richardson v. Grill*, 138 Fla. 787, 190 So. 255, text 257) and "it is not subject to execution for the debt of the husband" (*Hunt v. Covington*, 145 Fla. 706, 200 So. 76, text 77). Although it appears to be subject to execution jointly against the husband and wife (*Stanley v. Powers*, 123 Fla. 359, 166 So. 843).

From the above and foregoing authorities it seems that the execution in question should not be levied against personal property standing in the name of a husband and wife as an estate by the entireties. However, it might be possible for judgment creditor (in this case the state) by proper equitable proceedings to reach property standing in the joint names of a husband and wife when in fact and in equity it belongs to one of them and not to them jointly.

The above question is answered in the negative, in the absence of equitable proceedings determining otherwise.

October 31, 1951—051-389.

PERSONAL PROPERTY—SALES TAX LIEN— EXEMPTIONS

QUESTION: May personal property, exempt to the head of a family residing in this state under §1, Art. X, of the State Constitution, be subjected to the payment of delinquent sales taxes under Ch. 212, F.S.?

To: Honorable C. M. Gay, State Comptroller:

Section 1, Art. X, of the State Constitution, provides that "a homestead . . . owned by the head of a family residing in this state, together with one thousand dollars worth of personal property . . . shall be exempt from forced sale under process of any court . . . But no property shall be exempt from sale for taxes or assessments . . ." or for certain debts against said property. To constitute a head of a family there must be at least two persons who live together in the relation of one family, and one of them must be the head of that family. (*Whidden v. Abbott*, 124 Fla. 293, 168 So. 253, text 254). With certain exceptions (judgments for the payment of obligations contracted for the purchase of the property in question or for the repair or improvement thereof, or labor performed thereon) judgments against the owner of property exempt under Section 1, Article X, of the State Constitution do not become liens against such exempt property (*Hutchinson Shoe Company v. Turner*, 100 Fla. 1120, 130 So. 623; *Wilhelm v. Locklat*, 46 Fla. 575, 35 So. 6; *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127).

The above constitutional exemption of personal property is superior to the lien or claim of a landlord for rent of the premises

(Schofield v. Liody, 25 Fla. 1, 16 So. 780; Hodges v. Cooksey, 33 Fla. 715, 15 So. 549). It is also superior to the lien or claim of the Florida Industrial Commission for delinquent contributions due under §443.15, F.S. (Florida Industrial Commission v. Coleman, 154 Fla. 744, 18 So. 2d. 905). It is also superior to the lien of judgments against the owner of the exempt property (Hutchinson Shoe Company v. Turner, supra; Phare v. Randall, 97 Fla. 858, 122 So. 217; Milton v. Milton, 63 Fla. 533, 58 So. 718).

It is to be noted that the above mentioned constitutional provision provides that "no property shall be exempt from sale for *taxes and assessments*, or for the payment of obligations contracted for the purpose of *said property*, or for the erection or repair of improvements *on the real estate exempted*, . . ." which brings us to the question of whether the above obligation for taxes is general or limited to taxes or assessments against the exempt property itself. In the lower court's order, quoted in Florida Industrial Commission v. Coleman, supra, it was held that the reference was to taxes and assessments against the exempt property itself and not to taxes on other property of the owner. Upon the general question of what property is subject to process issued for the collection of taxes see 61 C. J. 1041, §1354, where the general rule, in the absence of constitutional or statutory provision, seems to be that any property, without regard to its general exemption status, may be subjected to such process.

Further considering the matter in question §212.15, F.S., provides for the issuance of a tax warrant for the collection of delinquent sales taxes, which warrant is required to be recorded in the office of the clerk of the circuit court "thereupon the amount of such warrant shall become a lien upon the title to any real or personal property of such taxpayer, situated in said county, against whom such warrant is issued *in the same manner as a judgment duly docketed and recorded* in the office of such clerk of the circuit court." Upon the docketing and recording of the said warrant the clerk of the circuit court issues an execution thereon as upon a judgment issued by his circuit court. There appears a slight difference in this provision of the statute and that involved in Lovett v. Lee, 141 Fla. 395, 193 So. 538, which provided for a similar docketing and recording of a tax warrant and that "the amount of such warrant so docketed shall become a lien upon the title to and interest, whether legal or equitable, in any real property, chattels, real or personal property of such person against whom such warrant is issued, in the same manner as a judgment duly docketed in the office of such Clerk of the Circuit Court with execution duly issued thereon and in the hands of the sheriff for levy, *and such lien shall be prior, preferred and superior to all mortgages or other liens filed or recorded subsequent to the date such lien became effective.*" Because of this difference in the statutes involved although the said Lovett v. Lee case is instructive it is not decisive of the question.

Under the statutes of this state the clerks of the circuit courts are required to keep and maintain certain record books (§§28.21 and 28.22, F.S.) including a judgment lien record (§28.21, F.S.) in which judgments must be recorded before they may become liens upon the property of the defendant (§55.10, F.S.), said last mentioned statute providing, in so far as here material, that "upon be-

ing so recorded said judgment or decree shall become *a lien upon the real estate of the defendant . . .*" Under the statute a judgment, whether recorded or not, is not a lien upon the personal property of the defendant. However, an execution becomes a lien on the property of the defendant, both real and personal subject to the execution, *from the date delivered to the sheriff* (Goodyear Tire and Rubber Company v. Daniell, 72 Fla. 489, 73 So. 592; Pasco v. Harley, 73 Fla. 819, 73 So. 30; Evins v. Gainesville National Bank, 80 Fla. 84, 85 So. 659; Love v. Williams, 4 Fla. 126).

Tax liens, both real and personal, are creatures of statute and are not recognized by the state constitution (State v. Culbreath, 140 Fla. 634, 192 So. 814). A tax is not a lien even on the property assessed unless made so by statute (Horn v. City of Miami Beach, 142 Fla. 178, 194 So. 620; St. Petersburg v. Fiore, 160 Fla. 106, 33 So. 2d. 852). The intent to create a tax lien must clearly appear from the statute (State v. Culbreath, supra; St. Petersburg v. Fiore, supra.)

In the light of the above observations, statutes and authorities it is doubted that a sales tax warrant and execution issued pursuant to §212.15, F.S., create a lien upon the personal property of a taxpayer, exempt to him under §1, Art. X, of the State Constitution, or that such a warrant and execution may be legally levied against such property. This answers the above question, at least until the said question is finally determined by the Supreme Court of this State, in the negative.

November 1, 1951—051-391.

DEALER—UNREPORTED SALES TAX—PENALTIES

QUESTION: Where a "dealer" within the purview of Ch. 212, F.S., collects sales taxes, levied under said chapter, from purchasers but fails and refuses to pay the same over to the State Comptroller and converts the same to his own use, does he violate any of the criminal statutes of this State?

To: Honorable C. M. Gay, State Comptroller:

It appears, from your file submitted with the above request for opinion, that the "dealer" in question operated a restaurant in this state and, during that period of time between November 1, 1949 and November 1, 1950, pursuant to the requirements of §212.07 (2) F.S., collected sales taxes from his customers (the purchasers), in connection with meals served and merchandise sold, totaling \$2,557.78, which he has failed and refuses to remit to the State Comptroller, as required by law, and apparently has converted to his own use. These facts raise the question of whether the said sum was the property of the said "dealer" or of the State of Florida.

It was held in the case of Spencer v. Mero, Fla., 52 So. 2d. 679, text 680, that "there is an ambiguity as to whether the tax is levied on the vendor or the vendee but it is clear that the law requires the vendor to bear the amount of the tax. The seller is required to collect it from the buyer. The buyer is liable for it. The seller is coerced to collect the tax and remit. To say that it is a tax on the seller is overcome by the fact that he is required to exact it from the purchaser. The spirit and intent of the law is that the pur-

chaser, and not the seller, shall pay it. This brings us to the question of whether the seller is liable for the loss of the funds by theft The plaintiff is not a voluntary trustee He is required to protect the trust with care, caution and vigilance of an ordinary prudent man in the conduct of his own private affairs. See 54 Am. Jur. p. 256. Under the circumstances clear and convincing proof of loss by theft will be required." It was in effect held, in this case, that if the "dealer" used due care, caution and vigilance in protecting the fund (the taxes collected by him from the purchasers) and the same was stolen the loss is that of the State instead of the dealer. The court seems to have treated the fund as a trust in the hands of the dealer, held by him for the benefit of the state. In case of theft of the fund, where the dealer has used due care, caution and vigilance to protect it, the loss falls upon the state. This case clearly shows that the dealer holds the fund as a trustee for the state.

The sales tax statutes of this State make it a misdemeanor for the dealer to fail, refuse or neglect to collect the taxes from the purchaser (§212.07 (4) F.S.). The taxes levied under the said chapter are due and payable on the first day of the month following the sale (§212.11, F.S.) and becomes delinquent on the twenty-first of said month (§212.15, F.S.). The time allowed for the payment of the taxes collected over to the State Comptroller has long since passed. The dealer is paid a compensation for collecting and remitting the tax (§212.12, F.S.).

Section 212.12 (2), F.S., provides that "in the case of a . . . wilful intent to evade payment of any tax imposed under this chapter . . . the person . . . wilfully attempting to evade the payment of such a tax shall be liable . . . for fine and punishment as provided by law for a conviction of a misdemeanor." The dealer in question has failed and refused to remit the sales taxes collected by him prior to November, 1950, we feel that this amounts to a wilful attempt, and evidences a wilful intent, to evade the payment of sales taxes due within the purview of the above quoted statute, so that the dealer may be brought to book under said statute.

It is also possible that the said dealer, having acquired the moneys in the nature of a trust and bailee for the state, might be guilty of statutory embezzlement within the purview of §812.01, F.S. This statute (then appearing as §7244, C. G. L., 1927) was construed by the Supreme Court in the case of *Fitch v. State*, 135 Fla. 361, 125, A. L. R. 360, 185 So. 435, text 440, where the said court said that the said statute "extends the crime of embezzlement to common carriers, bailees, etc., 'or any other person with whom any property which may be the subject of larceny is entrusted or deposited by another.' The title of this section and its content indicate that it was the intention of the statute to extend the embezzlement statutes to cover bailees." Although not mentioned in this case, it was held in *Mauk v. State*, 108 Fla. 439, 145 So. 887, that before a bailee comes within the purview of said §812.01, *he must be a bailee for hire*. In the subsequent case of *Dunham v. State*, 140 Fla. 754, 192 So. 324, text 326, the court applied the doctrine of "*noscitur a sociis* or *ejusdem generis*" to the statute, and citing with approval the case of *Townsend v. State*, 63 Fla. 46, 57 So. 611, held that the said doctrine applies to the last clause of the statute in question and said that "it must be understood as referring to *bailees for hire*,

not embraced in the enumeration of such bailee first set forth."

Although there is language in some of the above cases indicating that under the circumstances here a prosecution under §812.01, F.S., might lie, there is on the other hand some doubt in our mind that the case is within the purview of the said statute. We, therefore, feel that under the circumstances a prosecution under said §812.01, would be justified and would enable us to get a determination of the question which is probably involved in other like or similar cases.

We, therefore, suggest that account might be included, in case prosecution is had, based upon said §812.01, as well as one based upon §212.12 (2) above mentioned.

FINANCIAL MATTERS, GENERALLY

May 3, 1951—051-109.

BEVERAGE LICENSE TAX REFUNDS—MUNICIPAL ZONING REGULATIONS

QUESTIONS: 1. Where a beverage license was issued, pursuant to §561.34, F.S., to a vendor for the unlimited sale of alcoholic beverages, when as a matter of fact the sale of such beverages for the area covered by the said license was limited to sales by package, which should have carried a lower license fee, is the person purchasing the said license entitled to a refund of the difference between the cost of the license obtained and the one that should have been obtained?

2. If the above question is answered in the affirmative would the refund for a license purchased on September 27, 1948, for the license year ending September 30, 1949, and one purchased on October 1, 1949, for the license year ending September 30, 1950, be barred by the limitation contained in §215.26, F.S.?

To: Honorable C. M. Gay, State Comptroller:

Under §215.26, F.S., the state comptroller may refund to the person who paid the same any moneys paid into the state treasury which constitutes (1) an overpayment of any license due, and (2) a payment where no license is due. The payment in question may be considered as an overpayment or a payment when a definite portion of the tax was not due. It seems to be the matter of paying a greater license tax than was due. We, therefore, feel that the difference between the taxes actually paid and that which should have been paid is an overpayment of a license tax. The first question is, therefore, answered in the affirmative.

This requires a consideration of the second question. The moneys in question appear to have been paid, part on September 27, 1948, for a license to run until October 1, 1949, and a part on October 1, 1949, for a license to run until October 1, 1950. The first payment is clearly barred by said §215.26, F.S., which provides that applications for refunds "shall be filed within one year after the right to such refund shall have accrued else such right shall be barred." As to the latter payment made on October 1, 1949, we feel that it is to be classified as an overpayment or a payment when no tax was due.

I do not think the right to a refund did accrue until the litigation which was brought to determine the validity of the zoning regulations which prohibited the type of license in question was determined. Although the date of the court's decision is not given, it must have been after October 1, 1949, and therefore the one year statute of limitation apparently had not run by November, 1950, when demand was made for the refund for the year of 1949.

I think the validity of the license which was issued could not be determined until the validity of the zoning law itself was determined. Assuming that the court had thrown out the zoning law the license would have been valid and no refund could have been claimed at any time. It seems to me that the converse of this should be true, that since the license was invalidated by the action of the court in upholding the zoning regulation, the right to claim a refund of the part of the license which was invalidated did not accrue until the day of the court's decision. Your second question is therefore answered in the negative in so far as the 1950 license is concerned.

June 18, 1951—051-166.

BOARD OF CONTROL—FUNDS—DEPOSITS

QUESTION: The several institutions of higher learning under the management of the Board of Control have various kinds of funds, legislative appropriations, Federal grants, private donations, private grants and trusts, income from properties, auxiliary funds such as proceeds of book stores, soda shops, and similar business activities operated for student conveniences, funds for which they act as custodian such as student banks, etc. Please advise which of these classes of funds should be deposited in the State Treasury and which, if any, may lawfully be deposited in private banks.

To: Board of Control:

It is my opinion that under §§215.30 and 215.31, F.S., a part of the Five Fund Act, all funds which belong to the State of Florida should be deposited in the State Treasury, and that only those funds which are not the property of the State, such as student bank funds or monies held for the convenience of personnel which do not belong to the State, should be deposited in private banks.

Obviously, if a gift, donation or grant to any of the institutions should require its deposit in a private bank, then it would be the duty of the Board to so deposit it. The same would be true as to any funds which by contract prior to the Five Fund Act required their deposit in private banks, for example, funds pledged to liquidate revenue certificates where the resolution authorizing the certificates required deposit in private banks.

If you are in doubt as to any particular fund, I should be glad to advise you if you will give me the complete details as to the origin, ownership, and purpose of such fund.

CHAPTER XIV

HOMESTEADS AND EXEMPTIONS

METHOD OF SETTING APART HOMESTEAD AND EXEMPTIONS

February 21, 1951—051-34.

HOMESTEAD TAX EXEMPTIONS—HUSBAND AND WIFE LIVING APART

QUESTION: Where a husband and wife are living separate and apart and owning and maintaining separate residences in this State, is either or both of them entitled to homestead tax exemption?

To: Honorable C. M. Gay, State Comptroller:

The answer to the above question depends mainly upon the construction of §7, Art. X, of the State Constitution.

As a general rule the husband has the right to establish the family domicile and it is the duty of the wife to reside therein (Kennan on Residence and Domicile 444, §237; 17 Am. Dec. 615, §38; 26 Am. Jur. 639, §10; 41 C.J.S. 399, §10; Hunt v. Hunt, 61 Fla. 630, 54 So. 390, text 394; Thompson v. Thompson, 86 Fla. 515, 98 So. 589, text 590; Tigertail Quarries v. Ward, 154 Fla. 122, 16 So. 2d 812, text 813), husband and wife being, in the eyes of the law, but one person (Foster v. Cooper, 143 Fla. 493, 197 So. 117, text 118). This rule appears from the authorities to have been more strict formerly than at present (Kennan on Residence and Domicile 444, §238). Under the statutes and laws of many states the wife has been given a distinct legal entity different from that existing at common law (Kennan on Residence and Domicile 447, §239). In this State a wife may own and hold real property in her own name (§§1, 2, and 3, Art. XI, Florida Constitution) and may contract and be contracted with, as to her separate property, with but few limitations (§§708.01-708.10, F. S.).

The law, however, recognizes exceptions to this general rule, the foundation of which is the necessity for her protection and the fact that the interests of the husband and wife have ceased to be identical, thus the Supreme Court of the United States has said that the wife may acquire a separate domicile whenever it is necessary or proper for her to do so. (17 Am. Jur. 617, §43). The wife has the right to establish a domicile separate from that of her husband when he by his acts brings their cohabitation to an end (Hunt v. Hunt, 61 Fla. 630, 54 So. 390, text 394). For the purposes of divorce proceedings the wife may establish a separate domicile from that of her husband.

Under the Constitution for one to be entitled to homestead tax exemption he or she must own a legal or equitable interest in the real property on which they reside and must, *in good faith, make the same his or her permanent home.* Where the husband has

deserted his wife, or by his conduct and actions has made it necessary that she establish a separate home for her own safety and protection, (generally where his conduct is such as to constitute grounds for divorce or separate maintenance), she may establish for herself and children, if any, a separate home. Under these circumstances it seems that the wife would be entitled to homestead exemption without regard to her husband. The Tax Assessor, in the first instance, must determine from all the facts and circumstances whether the wife has just grounds for establishing a home separate from that of her husband, and if he finds that she has he may grant her homestead tax exemption. The Tax Assessor should exercise due care in this connection so that tax exemptions will not be granted to both the husband and wife when the wife has not legally established a separate domicile.

May 19, 1952—052-158.

HUSBAND AND WIFE—SEPARATE HOMESTEAD TAX EXEMPTION—ELIGIBILITY

QUESTION: When may separate homestead tax exemptions be granted to both a husband and a wife under §7, Art. X, of the State Constitution?

To: Honorable C. M. Gay, State Comptroller:

"Under the common law, husband and wife became one person, and the entire existence of the woman is completely merged or incorporated with that of the husband. This fundamental principle is the foundation of the common-law theory and rules of rights, duties and disabilities of marriage." (26 Am. Jur. 632, §3). However, in equity the separate existence of the wife has long been recognized, and under the married women's acts this unity of the spouses has been severed to a large extent in most states and abolished in others. In this State a married woman may purchase, hold and dispose of real property with very little limitation (Art. XI, State Constitution) and may contract and be contracted with §708.08, F. S., including contracts with her husband (§708.09, F. S.). A married woman in this State may own and hold real property as well as personal property.

As a general rule the husband has the right to establish the family domicile and it is the duty of the wife to reside therein (41 C.J.S. 399, §10); however, this rule was more strictly followed formerly than at present (Keenan on Residence and Domicile 444, §238). Although a voluntary separation has been held insufficient to give the wife a domicile separate from that of the husband (17 Am. Jur. 617, §43) she may establish a separate domicile where there exists grounds for divorce from her husband (17 Am. Jur. 619, §46), where the husband is guilty of such misconduct or ill-treatment as to make it unsafe for the wife to reside with him (17 Am. Jur. 620, §47) and where the husband has deserted or abandoned the wife (17 Am. Jur. 621, §48). Generally speaking where the husband has been guilty of such conduct as would constitute grounds for divorce or separate maintenance the wife may establish for herself a separate domicile, residence or home. It has been said that a wife may establish a separate domicile when her husband, by his conduct, brings their cohabitation to an end

(Hunt v. Hunt, 61 Fla. 630, 54 So. 390, text 394). In this connection see also the authorities cited and referred to in an opinion of this office of December 19, 1951 (051-467) bearing upon the question of separate domicile for husband and wife.

Section 7, Art. X, of the State Constitution seems to require three things to entitle one to homestead tax exemption in this State; (1) Ownership of the home, (2) residence thereon, and (3) the making of the same his permanent home *in good faith*. The Supreme Court (in Sparkman v. Scott, not yet reported) recently held that the Legislature could not add to this requirement.

From the above authorities, statutes and constitutional provisions it seems that a married woman, at least under circumstances entitling her to divorce or separate maintenance, may establish for herself a home separate and apart from that of her husband; under which circumstances the residence of the wife would not follow that of the husband. Where a wife has legally established for herself a separate domicile it would seem that she would be entitled to homestead tax exemption where she otherwise qualifies for such exemption. This seems to furnish the basis for answering the above question. The question being mainly one of fact of sufficient reason for the wife living separate and apart from her husband, ownership of the property, residence thereon, and the making of the same her permanent home in good faith. The wife must be the owner of the property claimed by her as a homestead.

Where a husband and wife were living separate and apart and maintaining separate homes on January first of a tax year and were divorced by decree entered in March, we feel that the wife would probably be entitled to an exemption on her separate home. Where no action for divorce or separate maintenance is pending, or no decree of divorce has been entered, the tax assessor should be careful in determining whether the separation is in good faith and under circumstances entitling the wife to divorce or separate maintenance.

April 6, 1951—051-82.

TAXATION—MANAGEMENT TYPE COOPERATIVES, ETC.—HOMESTEAD EXEMPTION

QUESTION: Where housing accommodations are made available to members of either a non profit cooperative ownership housing corporation or beneficiaries of a non-profit cooperative ownership housing trust, of the management type, are such members or beneficiaries entitled to homestead exemption from taxation?

To: Honorable C. M. Gay, State Comptroller:

The above question requires a determination of whether occupants of housing accommodations furnished such members or beneficiaries, and the agreements or circumstances under which furnished, vests in the said occupants such a title to the real property upon which they reside as to bring them within the purview of §7, Art. X, of the State Constitution. It seems to be admitted by the above question that the persons occupying the hous-

ing accommodation make the same their permanent home. We are merely concerned with the sufficiency of their title, and whether or not the same is sufficient to bring them within the purview of the above constitutional amendment.

In the case of a nonprofit cooperative ownership housing corporation it seems that the occupants would hold membership or stock in the corporation which carries with it the right to occupancy. Usually membership or stock in a corporation is deemed to be personal property and not real property. Leases of real property for a term are deemed personal property and not real property, unless a life estate in which case it is deemed to be real property. We, therefore, express doubt that such persons qualify for homestead exemption from taxation. However, their right to such exemption would depend upon the setup of the corporation, the nature of the interest of the members and the occupancy agreement.

In the case of nonprofit cooperative ownership housing trusts, each case would depend upon the nature of the trust and occupancy agreement. The interest of the occupant in and to the property occupied by him would largely control. If such interest was in the nature of personality there could be no such exemption. If the interest of the occupant was either a legal or a beneficial interest in equity to the real estate occupied by him he might be entitled to such exemption.

From the above and foregoing it is readily seen that each case must be determined for itself. No specific answer may be given to the above question. It is hoped that the above and foregoing observations furnish the formula from which the question may be determined in each case.

April 23, 1951—051-90.

HOMESTEAD TAX EXEMPTIONS—REMAINDERS

QUESTION: May a person vested with a remainder in a particular parcel of real property, subject to a life estate in another, be granted homestead tax exemption when in possession of the said property?

To: Honorable C. M. Gay, State Comptroller:

It appears from your file, furnished us with the above request for an opinion, that the owner of certain real property in this state conveyed the same to one of their children reserving in himself a life estate in and to the said property. It further appears that the said child and family are residing upon the said property. Granting that the said conveyance vested a present title in the said grantee, the title of the said grantee is nevertheless subject to a present and existing life estate in and to the said property. The grantee's title is in the nature of a remainder, or the residue remaining after the carving out the life estate. (See 26 C.J.S. 438, §136; 36 Words and Phrases 803 et seq., and supplement). So long as his estate continues the life tenant is entitled to the possession and enjoyment of the property (31 C.J.S. 46, §38) and the remainderman is not entitled to possession until the termination of the said life estate (31 C.J.S. 97, §85). If the said remainder-

man is in possession of the property he must be claiming such right to possession under the life tenant and not by virtue of his own title as remainderman. He does not appear to be entitled to immediate possession as remainderman. His present possession must be under some right of possession granted him by the life tenant. Not being otherwise advised we must presume that the right granted under the life estate is something less than that estate itself, this being true the tenant's right to present possession would probably be personal property and not real property. Furthermore, possession by a tenant is usually considered as possession under and for the landlord. Under the above circumstances, we do not feel that the remainderman, although in possession of the property, has such title as will bring him within the above provision of §7, Article X of the State Constitution. The owner of the life estate, having claimed homestead exemption upon the property occupied, may not claim an additional exemption on the lands in question although the occupants may be a child or children of his. These observations seem to answer the above question in the negative.

April 23, 1951—051-91.

HOMESTEAD TAX EXEMPTION—APPLICATION REFILED AFTER WITHDRAWAL

QUESTION: Where a person residing in this state files his declaration of domicile and citizenship and application for homestead tax exemption, but subsequently withdraws and cancels each of them, subsequent to the beginning of a tax year, may he refile the same, prior to April first of that tax year and be granted homestead tax exemption for that year?

To: Honorable C. M. Gay, State Comptroller:

It appears from your said request, and your file submitted therewith, that the applicant in question, sometime prior to January first of 1951, filed a declaration of domicile and citizenship and, soon after said January first, 1951, an application for homestead tax exemption upon certain real property occupied by him. Sometime after the filing of the said instruments the applicant caused each of them to be cancelled of record and recalled. After the said cancellation and recall of the said instruments the applicant caused another declaration of domicile and citizenship and application for homestead tax exemption to be filed. These instruments were duly filed prior to April first, 1951, and were therefore within the time allowed by statute for filing claims for homestead tax exemptions.

We will first consider the filing of the declaration of citizenship and domicile, its cancellation and withdrawal and subsequent refile. Under §7, Art. X, of the State Constitution, "every person who has the legal title or beneficial title in equity to real property in this state and *who resides thereon* and in good faith makes the same *his or her permanent home* . . . shall be entitled to an exemption from taxation . . ." Said §7, Art. X, was amended in 1938, which section, prior to said amendment, provided that "there shall be exempted from all taxation . . . to every head of a family *who is a citizen and resides* in the State of Florida" his homestead as de-

fined by said section. It seems evident by comparison of the above constitutional provisions that a material change was made in the constitutional provision by the 1938 amendment. The prior constitutional provision required residence and citizenship; the present provision requires residence and the making of the property one's permanent home. Citizenship was required under the constitution prior to the 1938 amendment; the present provision only requires permanent residence. A property owner may be entitled to homestead tax exemption notwithstanding he may be a citizen of another state or country, so long as he resides permanently in this state (*Smith v. Voight*, 158 Fla. 366, 28 So. 2d. 426). Only "permanent residence" is now required of home owners to entitle them to homestead tax exemption. This being true the filing, or filing and withdrawing, of a declaration of domicile and citizenship, under §222.17, F. S., is of little, if any, value, in determining rights to homestead tax exemption. Citizenship and domicile are not required; only permanent residence on the property. It seems evident from the file herein that the applicant was under the impression that homestead tax exemption might be claimed only by citizens of this state domiciled and residing therein.

Under the State Constitution (§7, Art. X) and the statutes (§§192.12 et seq., F. S.) for one to be entitled to homestead tax exemption he must be the owner of a legal or equitable title to real estate in this state, he must reside upon that real estate, and he shall make the same his permanent home. Doubtless the applicant in question has a proper title to his home and is residing in the same, this leaves the question of whether or not he was making the same his permanent home on January 1, 1951, the tax day for 1951 tax assessments against real property. Whether or not he was making the same his permanent home is mainly one of fact to be determined by the tax assessor from the facts placed before him by the applicant. The applicant is required to prove before the tax assessor that he is making the property in question his "permanent home." The tax assessor is, in the first instance, the judge of the sufficiency of the evidence placed before him by the applicant and whether or not it shows that the applicant has established his "permanent home" thereon.

The residence of a party consists of facts and intention. (*Warren v. Warren*, 73 Fla. 764, 75 So. 35). Residence indicates place of abode, whether permanent or temporary (*Minick v. Minick*, 111 Fla. 469, 149 So. 483). A permanent resident is a person who lives at a place with no present intention of removing therefrom (*Kiplinger v. Kiplinger*, 147 Fla. 243, 2 So. 2d. 870; *Fowler v. Fowler*, 156 Fla. 316, 22 So. 2d. 817, text 818). The term "resident," as used in many statutes, has the sense of permanent residence and not a temporary dwelling place. A permanent resident has been defined as a person with a fixed or settled place of abode with an intention of remaining there permanently (*Howard v. Queen City Coach Company*, 212 N. C. 201, 193 S. E. 138, text 140; *McLeod v. Stelle*, 43 Idaho 64, 249 P. 254, text 256). For one to make a certain parcel of land his permanent home he must reside thereon with a present intention of living there indefinitely, and with no intention of moving therefrom. (48 C.J. 920, §2; 17 Am. Jur. 605, §24; 1949-50 Biennial Report 218). Before a person is granted homestead exemption, when not a citizen of this state, he should

furnish convincing evidence to the tax assessor that he is and will continue to make his permanent home upon the property claimed as exempt.

The fact that the applicant filed one application and later withdrew it and subsequently filed another would not seem to bar his making another claim for homestead exemption, provided the latter claim is filed within the time provided by law. The fact of the withdrawal of the claim might be taken into consideration by the tax assessor in determining the question of permanent home but would not be conclusive of it. The permanent home must have existed on January first, the tax day.

These observations seem to answer the above stated question as definite as the same may be answered.

March 21, 1952—052-98.

TAXATION—PROPERTY—HOMESTEAD EXEMPTION— ROOMING HOUSES—APARTMENTS—ETC.

* QUESTION: Where a person has the legal title or beneficial title in equity to real property in this State and resides thereon and in good faith makes the same his or her permanent home, are the premises entitled to exemption from taxation, under §7, Art. X, of the State Constitution, when they are operated as a rooming house, an apartment house, a duplex, a motor court, or also has located thereon a business house or a garage apartment?

To: Honorable W. Homer Smith, County Tax Assessor, DeLand, Volusia County, Florida:

Statement of facts.—The above question assumes that the occupancy is sufficient within itself to bring the applicant within the purview of said §7, Art. X, if it was not also used for one or more of the purposes mentioned in the above question. We intend by the term "rooming house" a building occupied by a person otherwise entitled to the exemption but who rents one or more rooms therein from month to month or otherwise other than permanently. An "apartment house" is a building containing two or more apartments with one of them occupied by the owner of the building. A "home and business house" is a parcel of ground, less than one half acre when in a municipality or less than 160 acres when in the country, where the home is occupied by the owner and the owner operates a business in the business house. This also includes a combination business house and home, with the owner living on the second floor and operating a business on the first floor or vice versa. A "duplex" is a building divided into two living quarters, one of which is occupied by the owner and the other is rented to a third person. A "garage apartment" is where a home and a garage apartment is located upon the same lot or parcel of land within the area which may be embraced within a homestead, with either the main house or the apartment being rented. A "motor court" consists of several small buildings or living quarters located on a parcel of land, the area of which is within the homestead exemption laws, one of which is occupied by the owner and the remainder rented to third parties from time to time.

A study of §§1, 5 and 7 of Article X of the State Constitution reveals that we have two types of homesteads, one of a hundred and sixty acres of contiguous real property in the country *and the improvements thereon*, the other of one-half acre of contiguous lands in a city or town and *the residence and business house thereon*.

The country homestead extends to one hundred sixty acres of land without regard to the use made of the portion of the tract not covered by the residence and enclosures (Fort v. Rigdon, 100 Fla. 398, 129 So. 847; Armour and Company v. Hulvey, 73 Fla. 294, 74 So. 212), and may include uncultivated and unenclosed lands (McDougal v. Meginniss, 21 Fla. 362).

The municipal homestead is limited to the owner's residence and outbuildings together with the business house of the owner (§1, Art. IX, of the State Constitution). A small residence and a store building, on the lot upon which the owner's residence is located, rented by the owner to tenants are not a part of the homestead of the owner (O'Neal v. Miller, 143 Fla. 171, 196 So. 478, 129 A. L. R. 295), neither is an apartment house for rental purposes, upon the lot with the residence of the owner, to be considered as the business house of the owner and a part of the homestead (McEwen v. Larson, 136 Fla. 1, 185 So. 866).

General rule as to extent of homestead.—The general rule in other states seems to be that the homestead exemption, as against the claims of creditors, may extend to the whole of multiple dwellings, such as double dwellings, tenements, or apartment houses, notwithstanding the fact that a part of the dwelling is leased to tenants for residential purposes (Annotation in 128 A.L.R. 1431-1437). The rule seems well settled that the mere fact that property used as a residence is also used by the owner as a place of business does not cause it to lose its homestead character (Annotation in 114 A. L. R. 210-211); however, this rule seems to take into consideration the question of whether the family use or the business use is the primary or principal use, if the primary use is the owner's residence the exemption attaches but if the primary use is business the exemption does not attach (Annotation in 114 A. L. R. 212-213). It has been held in many cases that a building may be exempted when used by the owner as a home, although there is also conducted therein a hotel or lodging house business by the owner (Annotation in 114 A. L. R. 222-225). In some cases, where the business portion of the premises, occupied by a tenant, was a part of the same building in which the owner resided, it was held that the entire building was entitled to exemption (Annotation 114 A. L. R. 226-228); many of these cases seem to apply the principal use doctrine above mentioned. In Greely v. Scott, Fed. Case No. 5746, decided by the federal court in Florida about the year 1875, it was held that the Florida homestead seems to contemplate the exemption of the residence of the owner as well as his means of carrying on his business. See also In Re. Buie, 287 Fed. 896, 293 Fed. 1021, also involving Florida statutes and laws. These federal cases seem to hold that the constitution contemplates a single business homestead and not a multiple business homestead. There seems to be no decision of the Florida Supreme Court on this question.

The Supreme Court of Florida, in Smith v. Guckenheimer, 42 Fla. 1, 27 So. 900 and Jordan v. Jordan, 100 Fla. 1586, 132 So. 466,

held that under the provision of the Florida Constitution that "the exemption herein provided for in a city or town shall not extend to more improvements than the residence and business house of the owner," the homestead exemption is impressed only upon such buildings on the urban homestead as constitute the actual residence and business house of the owner, and is withheld from all other buildings and improvements. However, in *Cowdery v. Herring*, 106 Fla. 567, 574, 143 So. 433, 144 So. 348, the court held that where the owner of property was a widow without trade or profession or other means of support, and was residing on property which would otherwise be her constitutional homestead in its entirety, the renting out of a two-story garage building and a one-story frame building, used as a paint shop, for the purpose of using the rent as a means of livelihood, did not cause the rented structures to lose their character as homestead. The garage and paint shop were considered by the court as a business house. It does not clearly appear whether the garage and paint shop were separate buildings unconnected in any way. The case of *Overstreet v. Tubin*, Fla., 53 So. 2d. 913, has but little bearing, if any, upon the question here considered. The case of *Doing v. Riley*, CCA 5th., 176 Fed. 2d. 449, does not appear to involve the question here presented.

"A homestead includes everything appurtenant to the dwelling which may be, and is, used for the more perfect enjoyment of the home; but property cannot be considered appurtenant unless it is used principally and in good faith for homestead purposes." (40 C. J. S. 507, §68). This may include outbuildings, yards, playgrounds, gardens, and many other things. Garages for storing the family car would doubtless fall in this classification. Stated another way the homestead includes the dwelling house and its curtilage (see definition of "curtilage" in *Black's Law Dictionary*). These observations are primarily applicable to municipal homesteads under the laws of this state.

Any attempt to answer the above stated question, in the light of the above observations and authorities, finds us in a cloud of technicalities:

1. In the case of rooming houses, duplexes and apartment buildings, where the owner maintains his permanent home therein, we are confronted with the question of whether the renting of the premises is an incident to the use of the building as a home or whether the use of the building for a home is an incident to the rental of rooms and apartments therein. We are also confronted with the question of whether the renting of the building is the owner's business so that he is entitled to exemption as a home and business house. Where the assessor feels that the entire building may not be classified as a homestead then he should separate the uses and grant the exemption as to one use and assess the remainder under the other use (see *State v. Doss*, Tax Assessor, 150 Fla. 491, 8 So. 2d. 17).

2. Where the owner resides and makes his permanent home on a tract of lands and operates his business on the same lands, either in a separate building or in the building used as a home, it seems that the entire property would be

within the exemption provision. However, if the business was operated in the building of the owner, by another instead of the owner, then such building, unless the owner maintained his homestead therein, would not seem to be entitled to exemption. If the owner maintained his home in the building and rented a portion thereof for business purposes, and such rental for business purposes was not a mere incident to the use of the premises as a home, then we feel that the two uses should be separated with the use as a homestead being granted the exemption and the remainder taxed. If only a minor portion of the building was rented for business purposes then such use would not be the primary use and probably the entire premises would be within the exemption laws.

3. In the case of garage apartments, undoubtedly a homesteader is entitled to a garage as an appurtenance to his home and would be entitled to have the same included in his homestead for tax exemption purposes. Unless the garage apartment was of sufficient size to be deemed other than a subordinate use of the property it should not be assessed separately from the home but as an appurtenance thereto. There might be instances when it should be separated from the garage itself and assessed as above mentioned.

4. In the case of a motor court (within a municipality) the limitation of the constitutional provision would seem to prevent the exemption of more than the building in which the owner resided and another as his business house if the operation of a motor court was his business. If the court consists of a single building or of several buildings for multiple occupancy, then the above mentioned rules as to apartments and rooming houses would seem to apply.

5. The above observations should be limited to urban homesteads and not to homesteads in the country. In the country the exemption seems to extend to the home and all the improvements upon the premises when not exceeding one hundred sixty acres. Where a person is operating a motor court in the country and is making the same his or her business it would seem that there would be no limitation as to number of buildings on the property so long as not used for more than one business.

6. In all the instances above mentioned the exemption for purposes of taxation is limited to an assessed valuation of five thousand dollars.

August 17, 1951—051-276.

HOMESTEAD EXEMPTIONS—RESIDENCE QUALIFICATIONS

QUESTION: What effect should the county tax assessors give to certificates of domicile and of residence filed pursuant to §222.17, F.S., in determining the fact of residence, under §7, Art. X, of the State Constitution, and Ch. 26899, Laws of 1951, for the purposes of granting homestead tax exemptions?

To: Honorable C. M. Gay, State Comptroller:

Under §7, Art. X, of the State Constitution, to be entitled to homestead exemption one must be a resident of this state and reside on the property claimed as a homestead, or the same must be in possession of someone legally or naturally dependent upon the claimant. In either case the property must be the permanent home of the said claimant or those dependent upon him. The constitution does not define the term "permanent residence" or "resident," but does provide that "the Legislature may prescribe appropriate and reasonable laws regulating the manner of establishing the right to said" homestead tax exemption.

Chapter 26899, Laws of 1951, in effect provides that before one may claim homestead exemption in this State he shall, *at the time of making the application for such exemption*, "have been a legal resident of the State of Florida for a period of one year prior thereto." In this connection the tax assessor, as a condition precedent to granting any application for homestead tax exemption, is required to "require satisfactory evidence that such applicant has been a legal resident of this State *for one year immediately prior to the date of such application.*"

Section 222.17, F.S., as amended provides for the filing, with the Clerk of the Circuit Court, of statements or certificates of domicile or of residence established in this State; however, there is no indication in said section as amended, or in Ch. 26899 above mentioned or any other statute, that such statements or certificates of domicile or of residence shall be acceptable by the tax assessor as proof of residence for purposes to claiming homestead tax exemptions. *The purposes and intent of said statutes are not the same.* Although the said statements or certificates of domicile or of residence, provided for in said §222.17, F.S., as amended, are not binding upon the tax assessor there is no reason why he should not accept them for whatever evidentiary value they may have, although not bound to grant the exemption upon such statement or certificate alone. The requirement of Ch. 26899, Laws of 1951, is that the tax assessor be satisfied that the applicant is entitled to the exemption claimed.

In this connection, although §222.17, F.S., is intended for one purpose and Ch. 26899 for another, and the forms required to be prepared by the attorney general under said §222.17 are not designed as proof of residence for the purposes of homestead exemption claims, we see no reason why the tax assessor and the clerk of the Circuit Court may not, by mutual agreement, work out a form suitable for both purposes, containing the material provided for in the forms provided by the attorney general and such other material and information as may be desired by the tax assessor for purposes of proving homestead tax exemption claims. For a general definition of the requirements for residence meeting the homestead tax exemption statutes see an opinion of this office of September 12, 1949 (049-432) reported in part in 1949-50 Biennial Report 218, where it was held "that the claimants must have established their abode in this state with a present bona fide intention of making the same their permanent home. They must have a fixed and definite intention of remaining there and making the same their home perma-

nently, and with no present intention of removing therefrom in the future. A person to be a permanent resident does not have to be a citizen of this state, in fact an alien may have his permanent home in this state (*Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426)."

Chapter 26899, Laws of 1951, requires that a person, to be entitled to homestead tax exemption, shall make satisfactory proof to the tax assessor that he "has been a legal resident of this State for one year immediately prior to the date of" his application.

Under §192.04, F.S., the status of the property, for the purpose of taxation, is determined by its status as of *January first of the tax year*. Reading these 1951 statutes together, in the light of other existing applicable statutes, it seems that:

1. The claimant must be seized of either a legal title, or a beneficial title in equity, to the property claimed as a homestead *on January first of the tax year*.

2. The said claimant, or someone legally or naturally dependent upon him within the purview of the constitution, must be in possession of the property, making the same his or their permanent home, *on said January first*; however, this does not mean that there must in all cases be an actual personal occupation of the property on that date, a temporary absence will not defeat the right to the exemption (such as a short visit to kinfolks or friends, absence in search of health in some cases, in which connection see *Hillsborough Investment Company v. Wilcox*, 152 Fla. 889, 13 So. 2d. 448; *Collins v. Collins*, 150 Fla. 274, 7 So. 443) nor will absence by reason of compulsory military service under proper conditions (see 1949-50 Biennial Report 227 or opinion No. 050-574).

3. The claimant must have been a legal resident of this State, within the purview of our said opinion of September 12, 1949, for one year immediately prior *to the date of his application for such homestead tax exemption* (although the property is taxed as of January first the year of residence dates back from the date of the application.)

4. Sufficient proof of such facts must be furnished the tax assessor within the time allowed for filing claims for homestead tax exemption with the tax assessor (between January first and April first of the tax year).

September 4, 1951—051-294.

PROPERTY—TRUSTEE INSTRUMENT—HOMESTEAD TAX EXEMPTION

QUESTION: Where property is vested in a trustee with certain powers and duties over such property, with the beneficiaries in possession of the said property, may the said property be granted homestead exemption from taxation, when the trust agreement provides that the interest of the said beneficiary "is hereby declared to be personal property"?

To: *Honorable C. M. Gay, State Comptroller:*

It appears from the file submitted with the request for opinion that "the interest of each and every beneficiary hereunder and under said trust agreement and of all persons claiming under them or any of them shall be only in the earnings, avails and proceeds arising from the sale or any other disposition of said real estate, and such interest is hereby declared to be personal property, and no beneficiary hereunder shall have any title or interest, legal or equitable, in or to said real estate as such, but only an interest in the earning, avails and proceeds thereof as aforesaid, the intention thereof being to invest in said The First National Bank of Leesburg, Leesburg, Florida, the entire legal and equitable fee simple title in and to all of the real estate above described." It clearly appears from the above provision in the said trust agreements that the interest of the beneficiary is personal property only, the entire legal and equitable fee simple title in and to the real property encumbered by the said trust agreement being in the trustee.

Homestead tax exemptions in this State are authorized by §7, Art. X, of the State Constitution. Under this section of the constitution only persons permanently residing on real property, or having some of their dependents so residing thereon, and having either the legal title or a beneficial title in equity to such real property are entitled to the tax exemption. The beneficiaries above mentioned appear to have no such title, their title, by the trustee instrument, being expressly declared to be personal property.

September 4, 1951—051-295.

PROPERTY—CONTRACTS TO PURCHASER— HOMESTEAD TAX EXEMPTIONS

QUESTION: Where two persons enter into a contract wherein one of them, the vendor, agrees to convey real property to the other, the vendee, upon the payment of a sum certain, may the vendee be granted homestead exemption from taxation of the said real property?

To: *Honorable C. M. Gay, State Comptroller:*

Section 7, Art. X, of the State Constitution, provides that "every person who has the legal title or *beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home*, or the permanent home of another or others legally or naturally dependent upon said person, *shall be entitled to an exemption from all taxation, except assessments for special benefits . . .*"

"From the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor." (*Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658). "In equity, where the relation of vendor and vendee has been established by the vendor executing a contract to convey the legal title to property upon the payment by the vendee of the purchase price that he has obligated himself to pay, the vendee is regarded as the real beneficial owner, even though he has not paid the purchase

price". (Miami Bond and Mortgage Company v. Bell, 101 Fla. 1291, 133 So. 547, text 548).

"It is a general rule that the title to property agreed to be conveyed remains in the vendor as security for the payment of the agreed purchase price, and the vendee is regarded as the beneficial owner The purchaser in possession under an executory contract also has an interest which he may sell." (Marion Mortgage Company v. Grennan, 106 Fla. 913, 143 So. 761, text 766). In equity the purchaser of real property under a contract of sale is regarded as the beneficial owner. (Kozacik v. Kozacik, 157 Fla. 597, 26 So. 2d. 659, text 662).

"On strict analysis, however, the relationship is not that of an ordinary trustee and beneficiary. For 'while the vendor holds the legal title subject to an equitable obligation to convey to the purchaser on payment of the purchase money, he has, unlike an ordinary trustee, a personal and substantial interest, which he may actively assert.' 1 Tiffany, Real Property, 2d. Ed. Section 125". (Atlantic Beach Improvement Corporation v. Hall, 143 Fla. 778, 197 So. 464, text 446). Upon the death of the vendor his interest in the contract has usually been held to be personal property, while that of the vendee has usually been held to be real property. (55 Am. Jur. 787, §360).

Therefore, under the average contract for the sale of real property the vendee or purchaser holds a "beneficial title in equity to real property" within the purview of §7, Art. X, of the State Constitution; however, before such vendee or purchaser may claim homestead exemption he must be residing on the lands purchased and in good faith making the same his permanent home under the terms of the agreement, which must be a relation other than that of a tenant. The right of possession must follow from the contract itself, but must not be so limited as to amount to a landlord and tenant relationship.

Usually when a person is let into possession under a contract to purchase lands the ordinary relation of landlord and tenant does not exist between the parties. (55 Am. Jur. 788, §361). However, the general rule seems to be that in the absence of a grant of possession by the contract, either express or implied, the right of possession follows the legal title and not the equitable title. (Annotation 28 A. L. R. 1071). There is no Florida Supreme Court decision on this question, so we feel that the general rule should be followed in this state until settled by court decision. This being true, before the purchaser should be granted homestead tax exemption by reason of his possession such possession should appear to be pursuant to the contract and not merely the relation of landlord and tenant. The possession should be as an incident to the equitable title of the purchaser and the contract for purchase, or some agreement in amendment thereto, and not a mere relation of landlord and tenant.

We have examined the proposed contract submitted with the request for opinion and find therein no sufficient express or implied agreement for possession by the purchaser. Although there is an inference, from paragraph numbered three thereof, that the purchaser may occupy the premises, there is no certainty as to

the nature of that occupancy. It is stated in 55 Am. Jur. 784, §356, that "an executory forfeitable contract for the purchase of lands vests no element of title, either legal or equitable." We are unable to say whether the courts of this state would follow this rule or not.

Although we hold that the equitable title of a purchaser under a contract for the sale of real estate is within the purview of the state constitutional provision for homestead tax exemption, we further hold that there must be permissive possession as an incident thereto for the purchaser to claim the exemption. The possession must be an incident to the contract and not a separate relationship of landlord and tenant. We do not think that the contract submitted with the request for opinion fully meets these requirements.

October 29, 1952—052-298.

HOMESTEAD TAX EXEMPTIONS—LIFE ESTATE— REVERTER CLAUSE

QUESTION: Where a person purchases a life estate in a house and lot, to be paid for in monthly payments, sold by a Florida non-profit corporation and the purchaser occupies the house as his home, is the owner of the life estate, (which includes a reverter clause upon his death) entitled to homestead exemption under the Florida Constitution?

To: Florida State Improvement Commission:

Under §7, Art. X, of the State Constitution, "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars" This raises the question as to whether a leasehold life estate is a legal title or beneficial title in equity; although leasehold interests for years (no matter how long) have been considered a personal property, leasehold estates for life have usually been considered as freehold or real property (Black's Law Dictionary; 31 C.J.S. 16, §7; 73 C.J.S. 159, §7; 33 Am. Jur. 460, §2)

Therefore, the above stated question is answered in the affirmative; however, only the life estate could be exempted under §7, Art. X, of the State Constitution, the remainder existing in the lessor would be subject to taxation unless otherwise entitled to exemption as property held and *used exclusively* for some educational, literary, scientific, religious or charitable purpose within §1, Art. IX, or §16, Art. XVI, of the State Constitution.

CHAPTER XV

EDUCATION

THE COUNTY SCHOOL SYSTEM

January 25, 1952—052-19.

COUNTY SCHOOL BOARD MEMBERS—RESIDENCE DISTRICTS—BOUNDARY CHANGES—RESOLUTIONS

QUESTION: Where a county board within six months of the effective date of Ch. 23726, Laws of 1947, adopts a resolution dividing the county into five county board member residence districts, may they now, after the expiration of said six months, adopt another resolution changing the boundaries of the county board member residence districts in order to establish each such district equally on a population basis?

To: Honorable Edward F. Boardman, Attorney, Board of Public Instruction, Dade County, Miami, Florida:

In Attorney General's opinion 048-14 this office made the following statement:

"It is my opinion that notwithstanding the fact that within the six months period allowed for such action, your board adopted a resolution establishing five county board member residence districts differing from the county commissioners districts, they have authority under Section 230.07 to again change the boundaries of the districts in the month of January, 1948, and if they see fit, they may make them uniform with the county commissioners districts. In doing so, it will be necessary to comply with the procedural steps prescribed by Section 230.07 quoted above, except that the amendment of Section 230.06 having omitted its former provision for publication of the description of such boundaries, repealed that requirement and there is now no necessity for the publication."

I believe this opinion to be a correct statement of the law and concur therein. It is my further opinion that changes so made in board member residence districts need not necessarily conform to the county commissioners districts previously established. Your question is therefore answered in the affirmative, subject to the requirements of §230.07, F. S.

February 27, 1951—051-37.

COUNTY PROGRAM—PRIVATE SCHOOL FOR EXCEPTIONAL CHILDREN—LOCAL TAX FUNDS

STATEMENT and QUESTION: In Escambia county there is a private school for exceptional children known as the Petree Memorial School. In this school there are approximately forty-

nine pupils ranging from five to twenty-seven years of age who by reason of physical handicaps and mental retardation in various degrees have not been considered by parents to be capable of absorption in the regular public school program.

Based on these facts, you present the following question:

Could Escambia county from local tax funds legally take over and operate this school as a part of the county program under the provisions of §230.44, F. S., and under definition of "exceptional children" and procedures as found in §236.61, F.S., and State Board Regulation, pages 195-198 (1950 Edition) implementing §236.61?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

In studying the problems presented by your question it is necessary to consider the provisions of §13, Art. XII, Florida Constitution; §§230.44, 236.61 and 236.62, F. S.

The regulation of the State Board of Education set forth on pages 195-198 of the 1950 edition of State Board Regulations, provides detailed directions for carrying out the provisions of §236.61 and is based upon the authority contained in §236.61.

Since your question involves several issues, I believe it will be better to separate them for purposes of discussion as follows: First, disregarding the particular purpose of the school, may the school board of Escambia county acquire the buildings and facilities of the Petree school to be used as a part of the public school system and if so by what means?

Second, assuming that the county school board has legal authority to take over and operate the Petree school as a part of the county school system under the authority granted by §230.44, F. S., do the provisions and restrictions set forth in §236.61, F. S., apply in the operation and administration of the school?

Third, since according to the factual situation as disclosed by your letter, the pupils who are at present enrolled in the school range in age from 5 to 27 years and include pupils who are mentally retarded in various degrees, could all of these pupils continue to attend the school if it is made a part of the county public school system?

The first of these issues presents no real problem. County school boards are empowered to acquire property by purchase or lease if necessary for public school purposes. If in the discretion of the board of public instruction of Escambia county the acquisition of the Petree school building for use as a part of the county school system is necessary to the welfare of the public schools, then the board has the necessary statutory authority to acquire the property in the same manner it would employ in acquiring other property for school purposes (see §230.23 (4), F. S.).

The second problem is more difficult. The legislature in enacting §236.61 provided certain requirements which must be met for participation in a program of education for exceptional chil-

dren. In this section it is contemplated that the program shall be supported by state minimum foundation funds. The language contained in subsection (1) of this section indicates that the definitions and requirements contained therein apply only to the program provided therein.

Section 230.44 directs county school boards to "provide in so far as practical such services and facilities as may be necessary to assure to all such children an opportunity to obtain an adequate education *consistent with their individual needs and their physical and mental capacities*"

Section 230.44 may be construed in connection with §236.61 when the program contemplates use of state funds or separately if only county funds are to be used.

The latter appears to be the case in the proposed program in Escambia county since only local funds will be used.

Since this is the case, I do not believe that the county board would necessarily be bound by the definitions and requirements contained in §236.61.

The question then remains as to what restrictions or requirements the county board must consider in operating the Petree school for exceptional children as a part of its public school system.

Undoubtedly the basic constitutional requirement that school funds be spent for school purposes is met since the law recognizes the need and makes provision for training of exceptional children in the public schools.

The field of special educational facilities or services for exceptional children is comparatively new. The state of Florida has proved to be one of the more progressive states in undertaking such a program and now ranks among the leaders in developing this work but even so this form of educational training is still to a large extent experimental both from the standpoint of legal definitions and practical application.

I am informed that a conservative estimate places from 8 to 10 per cent of the children now attending public schools in Florida within the category of exceptional children as defined by §236.61 and interpreted by state department of education regulations and policies. This definition includes the following general classifications: visual, defects, hearing defects, speech impediments, special health problems such as heart disease, epilepsy, etc., emotional, mentally retarded and orthopedic, which includes cerebral palsy, post polio, malformations, etc.

This definition does not contemplate any special training for an equally important group of children who are exceptional in the sense that they are unusually gifted and who therefore require special services if they are to be given educational training in keeping with their individual capacities. Although the law does not include the latter group, many of the authorities in this field contend that at least equal importance should be attached to this phase of public education.

A major difficulty encountered in carrying out a program of special training for exceptional children as now defined, is to make a determination of children who should be accepted for such training. It is recognized that there must be an arbitrary line drawn between children who although suffering from some form of handicap, are capable of benefitting from public education and therefore entitled to such training under the law, and those children who are incapable of being taught and are therefore purely custodial cases.

Custodial care of children is not a part of the educational program as provided either in the constitution or the various statutes pertaining to education which have been enacted.

As stated above, the field of education pertaining to exceptional children is relatively new. The courts of Florida have not considered the numerous questions which will undoubtedly arise with the passage of time. In the meantime and in the absence of judicial construction, the general definition which appears to have been followed is that the term "educable child" is equivalent to a child capable of benefitting appreciably from educational processes.

The word "appreciable" is in itself incapable of exact definition and appears to be used deliberately to convey the intent of the legislature which apparently did not intend to extend educational facilities to the last conceivable and hypothetical benefit. It is obvious that unless some restrictive interpretation is placed on the word "educable" the whole program of specialized training for exceptional children might be jeopardized as being in reality a welfare project rather than an educational activity.

There is no evidence that the legislature intended to extend the ages of children who are eligible to attend the public schools through the provisions of the various sections relating to exceptional children. It follows therefore that the existing limitations placed upon ages of children eligible for admission to the public school system should be observed, taking into consideration provisions which have been made for adult training vocational work. This does not mean, however, that a pupil could be allowed to attend public school indefinitely. I believe that this question must be a matter of determination by the local school board along with other discretionary matters relating to eligibility for training under the program contemplated.

In summation of the various factors which must be considered in answering your question, I believe that the county board of public instruction in Escambia county does have the authority to take over and operate the Petree school. That in doing so it has a greater degree of discretionary power as to procedure and administration by virtue of the fact that the school is to be operated on county funds only, as authorized by \$230.44 rather than as a part of the program provided by \$236.61 which involves the use of state funds.

The decision as to which pupils shall be admitted to the school must be the final responsibility of the county school board within the general provisions of law and state regulations pertaining to school ages.

In my opinion, the procedures, definitions and requirements for participation set forth in §236.61 should be followed by the county board although no state funds will be used in the operation of the school. In other words, although the mandatory provisions of §236.61 may not apply in this instance, the necessity for such provisions would be equally apparent and should as a matter of policy be adopted by the school board in seeking to determine the eligibility of pupils to attend the school.

Section 236.62 provides qualifications for teaching of exceptional children but here again the legislature appears to have intended that its provisions are limited to schools supported by state funds since it uses the following language, "No teacher shall be employed to teach exceptional children *under the provisions of this law . . .*" (emphasis supplied). It may be that the legislature did not intend that this provision should apply to schools operated on county funds but even if this construction is placed upon §236.62 the wisdom of the provision is apparent and it should be adopted as a matter of policy by the school board. Certainly the teachers to be employed in the school must possess certificates to teach as otherwise provided by law.

In conclusion, your question is answered in the affirmative subject to the foregoing observations.

March 1, 1951—051-43.

COUNTY SCHOOL BOARD—CONSTRUCTION CONTRACTS OBTAINED BY BRIBES

STATEMENT and QUESTION: Several architects who were given contracts for work by a county school board for construction of buildings under a school bond program are reported to have testified before a Grand Jury that they paid a certain sum for obtaining these contracts.

Based on these facts, you request an opinion on the following question:

Can these contracts so obtained by these individuals be considered as valid?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

In the case of Florida East Coast R. R. Co. vs. Thompson, 93 Fla. 30, 111 So. 525, the Florida Supreme Court held: "As to innocent party, contract procured by fraud is voidable and as to wrongdoer it is void."

See also Columbus Hotel Corp. vs. Hotel Management Co., 156 So. 893, 116 Fla. 464: "Equity will rescind agreement procured through fraud even after partial execution of agreement, where it appears that complaining party would not have entered into agreement, nor changed his position thereby, if it had not been for influence of such fraud."

Your question as presented must be purely hypothetical, since it is only "reported" that the testimony concerning bribery was given before a grand jury. Assuming that such testimony was given and that the grand jury considered it of sufficient weight to

take some action based on such testimony, I believe that a school board would be authorized to suspend the contract in question pending judicial determination of the charges.

Even if the charges are substantiated, however, it would not necessarily have the effect of voiding the contract in question in so far as the board is concerned. It would have the effect of voiding the contract with respect to the contractor who obtained the contract by bribes or fraud.

In other words, I think the board could enforce the contract regardless of the fact that it was obtained by fraud or bribery if in its discretion it would be to the advantage of the county school system to do so. If it appeared that a better price could be secured or that the existing contract was not advantageous to the school board the contract could be voided at the discretion of the board upon proof that it was obtained through fraudulent means.

It would also seem that if members of the school board itself are parties to the fraud, the operation of the contract could be suspended or enjoined by a taxpayer's suit pending proof or dismissal of the charges.

March 3, 1952—052-62.

COUNTY SCHOOL BOARD—MUNICIPAL PAVING LIENS

QUESTION: May a county school board assume a paving lien levied by a municipality for paving a street leading to a public school center?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

I know of no legal authority for the expenditure of funds by a county school board for paving a street or highway. I am advised that in at least one instance a county has found it necessary to secure the passage of special legislation to accomplish this purpose when the street in question was adjacent to the school property. I know of no instance where school funds have been expended for paving of a street leading to a school.

April 3, 1951—051-74.

COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION— EMPLOYMENT OF BUS DRIVERS

QUESTIONS: 1. Does a county school board have the right to reject recommendations of the county superintendent for the employment of school bus drivers without showing cause?

2. If cause is to be shown, what is considered to be good cause under the statutes?

3. If any recommendations are rejected for good cause, should the county superintendent be requested to make other recommendations?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

Section 230.33 (7) (b), F.S., designating the duties and responsibilities of county superintendents of public instruction, pro-

vides: "Recommend in writing to the county board persons to act as administrative, supervisory, attendance, or health assistants, his office assistants, and bus drivers. "

A regulation adopted by the state board of education of Florida on February 14, 1950, provides: "To appoint all school bus drivers upon the written recommendation of the county superintendent of public instruction. The recommendation of the county superintendent may be rejected for good cause but not on personal or other grounds. In the event of rejection of the county superintendent's recommendation for good cause, it shall be the duty of the county board to request a second and if necessary a third recommendation for consideration. Should the third recommendation be rejected for good cause the board shall fill the position or positions upon its own motion."

In the case of *Arnold et al vs. State ex rel Culbreath et al*, 190 So. 543, The Florida Supreme Court stated:

"Under rule of State Board of Education requiring county board of public instruction to appoint all school bus drivers upon recommendation of the county superintendent of public instruction and to select duly qualified drivers in whom parents have confidence and feeling of security for the safety and care of their children, it is the duty of the county superintendent to recommend those physically, and morally fit and who possess such qualifications and if he fails to do so the county board may reject his recommendations but it cannot be rejected on personal or other grounds."

In view of the above, it is my opinion that your questions must be answered as follows:

Your first question is answered in the negative.

Your second question pertaining to a definition of the meaning of the phrase "good cause", I believe is best answered as follows: The cause for rejection must be something more than a mere frivolous objection on the part of the school board based either on personal animosity or political prejudice. The cause must consist of some act or characteristic on the part of the employee who is being considered which would give reasonable grounds to believe that the person is not properly qualified from a moral, mental or physical standpoint to meet the requirements ordinarily expected of a school bus driver. I believe that it is the duty of the county board in rejecting a recommendation by the county superintendent to give its reasons for such rejection and that the reasons must be such that an ordinarily prudent person considering them in an impartial manner would accept such reasons as being sufficient grounds to warrant the board in rejecting the recommendation.

Your third question is answered specifically by the above quoted section of the State board of education's regulations which states, "It shall be the duty of the county board to request a second and if necessary a third recommendation for consideration. Should the third recommendation be rejected for cause the board shall fill the position or positions upon its own motion."

April 8, 1952—052-114.

SCHOOL TRUSTEES—PRINCIPAL—POWERS—TEACHING STAFF—NOMINATION

QUESTIONS: 1. Is it mandatory that our board of school trustees consider only the names of those persons whom the principal or supervising principal recommend as teachers?

2. Could not the board seek or receive applications for teacher positions and recommend these to the school board irrespective of whether they are recommended by the principal or supervising principal?

3. As an example, suppose the board of trustees receive an application for a teaching position from Miss X and the board of trustees consider her qualified and recommend her to the school board. At the same time the principal or supervising principal should object. Could his objection prevail over the power given by law to the trustees to "select and nominate"?

To: *Mrs. Lassie G. Black, Chairman, Board of School Trustees, Lake City, Florida:*

The questions presented by you have been raised from time to time in various parts of the state. They have been considered at least in part in several decisions of the Florida Supreme Court, but your specific questions relating to the respective powers and duties of county school boards, boards of trustees and county school superintendent as applied to the employment of school instructional personnel, apparently have not been resolved. They still occur and for this reason I believe it advisable to discuss the problem at some length in this opinion. This is desirable in an effort to properly advise the county school systems throughout the state as to the proper procedure which should be followed under existing statutory regulations as they appear to us to have been interpreted in the court decisions which I shall discuss in this opinion.

A study of the problem requires a consideration of Art. XII, §10, and Art. VIII, §6, of the State Constitution and §§230.33 (7) (c), 230.33 (7) (d), 230.43 (1), 230.43 (2) and 231.35, F.S.

There are several general statements in the court decisions which shall be discussed herein, to the effect "that the power to select and nominate teachers for the public schools is vested in the trustees." See *State ex rel. Lawson v. Cherry*, (Fla.), 47 So. 2d. 768, and cases therein cited.

However, a close examination of the cases reveals that in none of the cases, except *Armistead v. State*, (Fla.) 41 So. 2d. 879, was there any question of the board of trustees not having followed the procedure prescribed by §230.43 (2) of nominating the individual recommended by the superintendent of public instruction.

State ex rel. Pittman v. Baker, 113 Fla. 865, 152 So. 682, decided by Division A (1934) involved and declared only that the trustees of school districts "nominate" and the board of public instruction may reject the nomination only when such rejection is reasonably grounded in some dereliction in statutory or other qualification.

There was no contention that the school board trustees had authority to select or nominate individuals not recommended to it by the county superintendent or principal or supervising principal, raised or held by the court. On such a factual situation broad language to the effect that "the trustees are vested with the power to 'nominate' to the county board of public instruction teachers for all schools within such special district," was not inconsistent with the school code. The case is apparently no authority for the factual situation to be considered in this opinion. The facts here presume that the board of trustees does not "nominate" the individual recommended by the superintendent or principal, but an entirely different and unrecommended individual, selected solely by the Trustees.

The case of Board of Trustees of Special Tax School District No. 6 of Orange County v. Board of Public Instruction of Orange County, 116 Fla. 176, 156 So. 318, decided by the Supreme Court of Florida en banc (1934), involved the question, and decided only, that the trustees of the school district could compel the county board to accept its nomination of a teacher in the absence of some good cause; citing the Barker case, *supra*, and defined "teacher" as a supervising instructor in advanced grades as well as a teacher in the ranks of the school system. Like the Barker case, there was no question raised or passed on by the court that the board of trustees had refused to consider the recommendation of the county superintendent and/or principal or supervising principal in making the nomination to the board of public instruction. The language used was appropriate to the factual situation before the court but the case is not authority for the factual situation we assume in this opinion.

The case of State ex rel. Pittman v. Barker, 118 Fla. 380, 160 So. 362, decided by Division B (1935), held that boards of public instruction may for good cause, reject the nomination of the school trustees; but mere disharmony in the community was no such ground. For the same factual distinction as was indicated in the Barker and Trustees of Orange County cases (above), this case is no authority for the factual situation assumed in this opinion.

The case of State ex rel Hendricks v. Thompson, 121 Fla. 613, 164 So. 364, decided by the Supreme Court en banc (1935), involved only the question of whether or not the trustees could compel the county board of public instruction to employ janitors nominated by the trustees. The case held that as the county board of public instruction had to approve contracts paying out school funds, and in view of the statutory authority in the county board with regard to heating and ventilating, etc., in school houses, the nominees of the board of trustees had not shown such clear right as would justify mandamus to the county board of public instruction to compel their employment. The language of the case, however appropriate to that factual situation, is no authority for the questions raised in this opinion for the reasons hereinbefore specifically indicated in the Barker cases et al cited above.

The case of State ex rel Carter v. Platt, 131 Fla. 240, 179 So. 408, decided by Division A (1938), involved only the question, and held, that in a mandamus proceeding to compel the board of public instruction to approve a principal's nomination by trustees, that a

return alleging general antagonism, insubordination, etc., was insufficient to show good cause for rejecting the nomination of the trustees, and that amendment of the return would be required. Again, any broad and general language used in the case relative to the power of the trustees to "select and nominate" must of necessity be restricted to the factual situation before the court which was entirely different from the facts we assume for this opinion. The case is no authority for the theory that the trustees may consider or receive recommendations and recommend individuals to the board of public instruction as principals or teachers, who are not recommended to the board of school trustees by the superintendent of public instruction and the principal or a supervising principal as the case may be.

The case of *Vassar v. State ex rel Gleason*, 139 Fla. 213, 190 So. 434, decided by the Supreme Court (1939), involved and determined only that the trustees of the school districts shall nominate the teachers for all schools within their respective districts without regard to the source of funds paid for the construction of the school. It is again clear that such a factual situation is not at all analogous to the questions here presented. The case is but the broadest authority for the right of the school trustees to "nominate", and no real authority for the proposition that the school district trustees are not, or should not be limited to "nominating" from among those recommended by the superintendent of public instruction and/or the principal or supervising principal.

The case of *State ex rel Altman v. Arnold*, 140 Fla. 80, 191 So. 71, decided by the Supreme Court (1939), involved only the power of the board of trustees, assumedly acting pursuant to law, to compel the acceptance of a nominated principal of the said board of trustees, and a rescission of a contract question. There was no question of the power of the trustees to nominate outside of the recommendations of the superintendent of public instruction, and/or the principal or supervising principal, involved or decided in the case. Any language used must be considered in the light of such a factual situation. The case is apparently no authority for the proposition of law raised by the questions you present and the assumed hypothetical set of facts on which we render this opinion.

The case of *Board of Public Instruction for Manatee County v. State ex rel Trustees of School District No. 16 of Manatee County*, 148 Fla. 57, 3 So. 2d. 707, decided by Division A of the Supreme Court (1941), determined only that the contention of the county board of public instruction, to wit, that the superintendent of public instruction should nominate the teachers of a certain high school because such school was a county school within the meaning of Chapter 19355, Acts of 1939, was without merit in the light of Art. 12, §10, of the Constitution, which places in the trustees "general power of the trustees of special tax school districts to nominate teachers in a regularly constituted special tax school district." The court stated further, "... it follows that the case is ruled on this point by *State ex rel Pittman et al v. Barker, et al.*, 113 Fla. 865, 152 So. 682, 94 A.L.R. 1481; *State ex rel Altman v. Arnold*, 140 Fla. 80, 191 So. 71, and like cases so the judgment appealed from is affirmed."

The court in the *Manatee County School Board case*, *supra*,

cites to the Barker and Arnold cases, *supra*, as controlling and stating the point of law involved. For the factual differences already discussed the Manatee case, *supra*, is distinguishable and no authority for the proposition of this opinion.

The case of Board of Public Instruction for St. Lucie County v. Connor, 148 Fla. 364, 4 So. 2d. 382, decided by Special Division A of the Supreme Court of Florida (1941), involved and held, only that a defendant board of public instruction was liable for the salary of one nominated by the trustees of the school district and not employed, when another not so nominated was employed, without good cause for rejecting the nominee of the board of trustees. The case is clearly no authority for the principle of law that the board of trustees is not bound to make its nominations from the individuals recommended by the county superintendent of public instruction and/or the principals or supervising principals.

The case of Laney v. Holbrook, 150 Fla. 622, 8 So. 2d. 465, decided by Division A of the Supreme Court of Florida (1942), held that under the statute pursuant to which the discharge of a public school teacher was sought, allegations and proof had to be specific and vital due process satisfied by findings of fact by the board of public instruction after the charges are preferred by the trustee of the school district. It is quite apparent that the case is not authority for the determination of the questions presented for our opinion.

The case of State ex rel Kelley v. Golson, 153 Fla. 469, 14 So. 2d. 793, decided by Division A of the Supreme Court of Florida (1943), held that in the absence of good cause the board of public instruction could not refuse to employ a supervising principal nominated by the trustees of the school district.

It should be noted that this and the decisions in several other cases cited above were not decisions by the court en banc, and hence, no constitutional or statutory conflict with the fundamental law could validly be decided. (See Art. V, §4 (b) (2) of the Constitution). But the court in this case for the first time construed the language and statutes which bear on the questions herein raised, and in the Kelley v. Golson case, said:

"Section 231.35 and various parts of Section 230.01 et seq., Florida Statutes of 1941, F.S.A., 231.35, 230.01, et seq., place limitations on the power of the trustees of special tax districts to nominate teachers but insofar as the time and manner of the nomination is concerned they were substantially complied with in this case and, being true, the nomination can be rejected only for good cause as specified in State ex rel. Pittman v. Barker, 113 Fla. 865, 152 So. 682, 94 A.L.R. 1481; see also same styled cause in 118 Fla. 380, 160 So. 362."

In Armistead v. State ex rel. Smyth, Fla., 41 So. 2d 879, the Supreme Court of Florida, en banc (as required by the constitution), for the first time in the decisions we have been able to find had before it similar issues, constructions and constitutional questions framed by the factual situation on which our opinion is requested.

In this case the board of trustees, without showing good cause therefor, ignored the name of the individual recommended and sub-

mitted by the county superintendent of public instruction pursuant to the provisions of §230.33 (7) (c), *supra*, for the position of supervising principal, and rejected and refused to nominate the recommended individual according to and in the manner provided by §§230.43 (1) and 231.35, F.S.

The factual situation of the Armistead case, *supra*, was thus almost identical with the hypothetical facts on which we are asked to render an opinion.

In the Armistead case, *supra*, the court had to construe §§230.33 (7) (c), 230.43 (1) and 231.35, F.S., in *pari materia* with Art. 12, §10, of the State Constitution, and determine the constitutionality of issues most similar to those now raised.

We have now to interpret §§230.33 (7) (d), 230.43 (2) in the light of the heretofore mentioned §231.35 and Art. 12, §10, of the Constitution, as construed and interpreted in the Armistead decision.

It is clear that our hypothetical facts raise very similar law questions and principles, except that in the Armistead case, *supra*, the position and nomination of a supervising principal was involved (See §230.43 (1)). Our hypothetical set of facts raises essentially the same principles of law with respect to the factual proposition of "teachers and other members of the instructional staff and other personnel . . ." (See §230.43 (2)).

The Florida Supreme Court in the Armistead case, among other things, specifically ruled against, (1) the contention that there was no legal duty on the trustees to accept the individual recommended for the office of supervising principal by the county superintendent; (2) the contention that §§230.43 (1) and 231.35, F.S., do not require the board of trustees to show "good cause" for its refusal or declination to approve or adopt the recommendations of the county superintendent, and; (3) the contention that §230.43 (1) and 231.35 F.S. are each violative of and in conflict with §10 of Art. 12 of the Florida Constitution.

In this case the court said:

"The position of Superintendent of Public Instruction is a county office and recognized as such by our Constitution. Section 6 of Article 8 of the Florida Constitution. Innumerable duties under our educational system are imposed by statute on the office of the County Superintendent. Chapter 230, F.S.A., Section 230.33 (7) (c) makes it the duty of the County Superintendent to 'submit to the trustees of each school district his recommendation of a person to fill the position of district supervising principal or principal each district school.' It is shown by the record that the county superintendent recommended the relator-appellee to the board of trustees of district No. 1 for the position of supervising principal for the school year 1949-1950.

"Some of the statutory duties imposed on the board of trustees are set forth under Section 230.43 (1) F.S.A. It provides: The specific powers of the trustees, which shall be exercised by the trustees of any district only when act-

ing as a body, shall be: Nominations of district supervising principal or principals: 'To consider the recommendations of the county superintendent regarding all persons to be nominated by them for district supervising principal or principals of all district schools or to make nominations for such positions to the county board; provided, that all nominations for reappointment of district supervising principals or principals shall be submitted to the county board at least eight weeks before the close of school.'

"Section 231.35 F.S.A. provides for the appointment of employees: "All employees of the county school system shall be appointed as prescribed in Chapter 230; provided that the terms 'to consider the recommendation of' or 'to act upon the recommendation of' shall be interpreted to mean that neither the trustees nor the county board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, and that when any such rejection has been made, a second and if necessary a third recommendation or nomination shall be requested and if made within a reasonable time as prescribed by the county board, shall be considered or acted on as prescribed by law before the trustees or county board shall have a right to nominate or to appoint on their own motion; and, provided further, that the following procedure shall be observed in making appointments and reappointments of instructional personnel:'

"It is a well established rule of statutory construction that the language of a statute may be so plain as to fix the legislative intent and leave no room for construction. If the statute is plain and unambiguous and admits of but one meaning, the courts in construing it will not be justified in departing from the plain and natural language employed by the legislature. *Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157. It is the duty of the County Superintendent under Section 230.33 (7) (c) supra, to submit to the board of trustees his recommendations of a person to fill the position of district supervising principal. Section 230.43 (1) makes it a duty of the Board of Trustees to consider the recommendations of a County Superintendent for the position of supervising principal of a school.

"Section 231.35 F.S.A. provides that the 'Trustees nor the county board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, and that when such rejection has been made, a second and if necessary a third recommendation or nomination shall be requested.' The recommendation as made by the County Superintendent to the Board of Trustees was pursuant to a statutory direction and the Board of Trustees were without power to reject the recommendations so made except for a 'good cause,' which has not been made to appear in this record.

"The second phrase of the question is that section 231.35, F.S.A. is invalid and unconstitutional because it is in conflict with Section 10 of Article 12 of the constitution of Florida, which is viz: 'The Legislature may provide for the provisions of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all the schools within the district; . . .' Many of our decisions construing the above Section, as cited by counsel for appellants to the effect that the power to nominate teachers for the school district is lodged in the Board of Trustees, or correct and our rulings thereon are hereby reaffirmed. We are not convinced on this record, however, that the supervisory power to nominate teachers has been changed by the provisions of Section 231.35 supra, as the power to make the nominations remains in the Board of Trustees. The section complained of simply regulates the manner and means of making the nominations but does not destroy or change this constitutional power vested in the Board of Trustees.

"It is established law that the law making power of the Legislature of the State of Florida is subject only to the limitations provided in our Constitution and no statute shall be declared inoperative on the grounds that it violates organic law, unless it clearly appears beyond all reasonable doubt that there is a positive conflict. *City of Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L.R.A. 1916D, 913 Ann. Cas. 1915D, 99. It is our view that a field of operation can be found both for Section 231.35 and Section 10 of Article 12 of our Constitution by holding that the challenged statute prescribes reasonable regulations in behalf of the public school system of Florida that must be observed and followed by the constitutional officers in the performance of their duty. It was the intention of the Legislature when functioning in behalf of our public school system, to require the trustees to show a good cause or reason for the rejection of the nomination of a qualified teacher as recommended by the County Superintendent, thereby making it beyond their power to arbitrarily and capriciously reject the nomination of a competent and qualified teacher unless a good cause or reason for the rejection was made to appear."

We feel that the foregoing opinion of the Supreme Court is decisive of the questions asked in this opinion. From the court's opinion it is apparent that the Supreme Court, en banc did not feel that the provisions of §§230.33 (7) (c), 230.43 (1) and 231.35 were unreasonable regulations as to the time and manner of making nominations by the school board for the office of principal or supervising principal.

On the contrary, the court indicated that the provisions of §231.35 were expressly mandatory "and the Board of Trustees were without power to reject *'any recommendations or nominations submitted as prescribed by law . . . except for a 'good cause' . . .*" (Emphasis supplied.)

There is certainly no logic in holding that the method provided by law for nomination by the board of trustees and approved by the court in construing §230.43 (1) and holding §231.35 F.S. applicable thereto does not apply to recommendations made by "the district supervising principal or the principals of the school in the district and the county superintendent." Such recommendations are made under the express statutory direction of Section 230.43 (2).

There is, on the other hand, every reason to presume the Supreme Court would declare the rule of the Armistead case to be applicable to the question at hand. First, as indicated above, to do otherwise would be inconsistent with the interpretation of the sections given in the Armistead case.

Second, the paragraphs are parts of the same section and demonstrate the same legislative intent as to the fundamental procedure to be followed. (See §230.41 (1) and (2)). It is not difficult to perceive why the Legislature separately numbered them (1) and (2). It would have been impractical to have lumped together the provisions of the two paragraphs and make the nomination of principals and teachers mandatory from the recommendations of the same principals and the county superintendent. In other words, the legislature did not intend for principals to recommend themselves for office and have such recommendations binding upon the superintendent.

It is my opinion that the recommendations of the "district supervising principal or the principals of the school in the district and the county superintendent, regarding the nomination of teachers and other members of the instructional staff" is just as mandatorily binding on the board of school trustees under §230.43 (2) construed in conjunction with §231.35 as it was held to be with respect to §230.43 (1) in the Armistead case.

The Supreme Court deemed the various sections interrelated for the purpose of construction and harmony of result and effect. This is clearly indicated by the language of the Golson case, *supra*, wherein the Court said: "Section 231.35 and various parts of Section 230.01 *et seq.*, Florida Statutes of 1941, F.S.A. 235.35, 230.01, *et seq.*, place limitations on the power of the trustees of special tax districts to nominate teachers . . ." (Underscoring ours). It would seem to strain both logic and reason to hold that the provisions of §231.35 will apply to the "recommendations of the county superintendent" (See §230.43 (1)L) and will not be applied to the "recommendations of the district supervising principal or principals of the school in the district and the county superintendent" (See §230.43 (2)). The language used in each sub paragraph of the section is almost identical, except that for excellent practical considerations the legislature wisely foresaw and saw fit to have the principals recommended by the superintendent, and the teachers recommended by the superintendent and the principals.

Such a rule is reasonable in view of the quite obvious distinctions for classification purposes, between principals and teachers. Especially is it so in the light of our law which makes the superintendent's recommendation for principal mandatory in the absence of "good cause" for nomination by the board of trustees, (see the Armistead case), which insures a harmony of recommendation be-

tween the superintendent and the principal recommended by him, when the recommendation of teachers to the trustees is to be made.

To hold that the provisions of §231.35 should not apply to the recommendations made pursuant to §230.43 (2) is to declare the procedure provided by the legislature inoperative for no apparent reason. Certainly such a holding would not contribute to the efficiency of the school system. The school system and school code were designed to have professional teachers and those closest to educational needs of the children recommend the best qualified of their colleagues to fill both teaching positions and the offices of principal and supervising principal and that such recommendation should carry considerable weight. It seems to me that the legislature intended to provide that an over-all general supervisory control and veto power should be lodged in the boards of trustees, as provided by the Florida Constitution, but that such authority should be exercised only for good cause, and that the trustees were not intended to ignore the recommendations of professional educators, i.e., the superintendent and principal, for purely frivolous reasons.

The school code is a system of checks and balances within itself designed to remove the educational process as far as possible from partisan politics. To hold that the rule enunciated in the *Armistead* case, *supra*, does not apply to the "recommendations" required pursuant to the provisions of §230.43 (2) would to a large extent destroy the design and intent expressed in the constitution and as implemented by the legislature.

The power of the trustees to "nominate" is not any more abridged by this interpretation than in the factual situation of the *Armistead* case. The Supreme Court has declared that such regulation is reasonable and clearly constitutional. It is no less reasonable or constitutional in effect when applied to the hypothetical facts of this opinion, and §230.43 (2).

Consideration, however, should be given to two more recent cases and the provisions of §230.33 (7) (d), as related to the conclusion set forth above.

In *State ex rel Lawson v. Cherry* (Fla.), 47 So. 2d. 768, decided by Division A of the Supreme Court of Florida (1950), the Court made statements similar to those referred to in the beginning of this opinion. It should be noted that the facts before the Court in this case involved no questions of constitutional or statutory construction such as were involved in the *Armistead* case. The *Cherry* case held merely that as between the trustees and the school board the nomination by the trustees was final except for some good cause, such as moral or professional disqualification. There was no issue raised as to the powers of the trustees to nominate independently of the recommendations of the superintendent of public instruction and/or the principals or supervising principals and the superintendent.

Indeed, the court *after* the general language we referred to in the outset of our opinion had this to say:

"It is true that under the school code the county superintendent may nominate or recommend a supervising principal and the trustees may not arbitrarily reject such a nomination . . ."

From the foregoing, it is very clear that the Cherry case is not a limitation of the principal of the Armistead case and for the purposes of this opinion should be considered in the same category as the other cases herein discussed.

If for no other reason, the constitutional provisions requiring all constitutional and statutory construction conflict questions, to be determined by the court en banc (Art. V, §4 of the Constitution), would preclude any language which was used in the Cherry case acting as a limitation of the en banc decision of the Court in laying down the Armistead rule. As we have clearly pointed out, however, the Cherry case is in point of fact entirely different from the question we have before us in this request for our opinion.

I know of only one case subsequent to the Cherry case which should be considered for the purposes of this opinion: In *Bradshaw et al v. Pinkston* (Fla.), 53 So. 2d. 525, decided by the Supreme Court en banc, June 26, 1951, the factual situation was again closely similar to the questions with respect to which we render this opinion, and the Armistead case. In this case the school year closed at a certain school on May 26, 1950, and the county superintendent did not make an affirmative recommendation to the trustees for the appointment of a principal for the ensuing year. The trustees, on April 15, 1950, nominated a principal and gave notice of their action to the county board which approved the nomination July 10, 1950. That case raised specifically again the question as to whether or not the trustees could nominate any person for principal until such person had first been recommended to them by the county superintendent. The court held again specifically that the trustees were without such power, saying:

"At final hearing on the merits the chancellor entered the decree appealed from. In this decree the chancellor found that under the applicable law the trustees 'were powerless to recommend any person for principal . . . until such person had first been recommended to them' by the County Superintendent; that notwithstanding this fact 'the Trustees upon their own motion, and without any recommendation being first made to them, as required by law, by the County Superintendent, did recommend . . . E. B. Pinkston for reappointment . . . and the County Board attempted to act thereon and approve the said recommendation . . . but both the trustees and the Board acted without authority of law . . . ' The Chancellor found, further, that though the action of the Board in appointing Pinkston upon the recommendation of the trustees was wholly without authority of law, inasmuch as the trustees had not submitted a nomination at least six weeks before the close of the school year, the Board 'can now proceed, and should do so, without delay to name and appoint some person as principal of the Jennings school . . . And when the said Board so acts, it is the lawful duty of the . . . Superintendent of Public Instruction and the . . . Chairman of said Board, to consummate, without delay, the appointment of the person so selected by said Board for said position, by entering into the usual contract with such person as such Principal . . . '

"We are unable to find any error in the decree of which

the appellants can complain. Concededly, the normal procedure to be pursued in selecting a principal of a district school is for the County Superintendent to recommend a person for the position to the trustees. If they act favorably upon the recommendation the trustees are required to advise the county Board of their action; and the Board is under the duty of employing the person nominated, unless the person is rejected by the Board for good cause. But this procedure is subject to the qualification that unless the trustees make the nomination within the time limits required by law, 'the county board may upon its own motion, appoint' such principal. Section 230.23 (7) (c), Florida Statutes 1949, F.S.A."

Although like the Armistead case, *supra*, the Pinkston case does not specifically hold that the recommendations made to the trustees pursuant to the statutory requirements of §230.43 (2) are mandatorily binding on the Board of Trustees and that the said trustees may not nominate outside of the recommendations so made except as provided by law in §231.35, nevertheless, I believe for the same reasons advanced in the discussion of the Armistead case, *supra*, that the Pinkston case, is a reaffirmance of the rule of the Armistead case in all respects.

The provisions of §230.33 (7) (d) have very little, if any, applicability to the questions raised in this opinion. That subsection merely refers to and fixes certain duties and responsibilities of the County Superintendent. It has no bearing on the duties and responsibilities placed by the legislature on the trustees in so far as the question considered here is concerned.

It should be noted that the conclusion reached herein changes to some extent the opinion rendered by this office on April 15, 1949 (No. 049-158) which was issued prior to the Armistead case which clarified the constitutional aspects of the questions herein involved and in the light of which we are bound to construe our own subsequent opinions.

For the foregoing reasons I believe that the overall design of the School Code may best be achieved by a harmonious integration of the system of checks and balances provided by the legislature in the overall interest of the education of the pupils. Thus the professional and technical aspects placed by law in the principal and superintendent should not be elevated to the general overall supervisory control placed in the hands of the trustees and of the county board but by the same token, the general overall supervisory and control powers placed by law in the trustees should not be extended into minor, routine, professional and technical problems of administration. The three major branches of school government, i.e., the board, the trustees and the superintendent, should endeavor to work together harmoniously, in the development of a better and more efficient educational system in Florida.

In view of the foregoing remarks, I believe your questions must be answered as follows: Your first question is answered in the affirmative; the second question in the negative; and the third question in the affirmative.

June 10, 1952—052-181.

COUNTY SUPERINTENDENT PUBLIC INSTRUCTION—
PTA AUDIT OF BOOKS

QUESTIONS: 1. Would it be permissible for the Parent Teachers' Association in a Florida county to have a certified public accountant audit the books of the county superintendent of public instruction?

2. Could such an audit, if permissible, be used as an aid in the interpretation of the findings with a view to improving the school system of the county?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Section 119.01, F. S., reads:

"Public records open to examination by citizens.—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

Section 230.03 (2), F. S., reads:

"County board.—Responsibility for the organization and control of the public schools of the county shall be vested in the county board, as provided in paragraphs 230.04-230.05."

Section 230.03 (4) reads:

"Trustees.—All schools in any school district which are supported in part from school district funds shall be under the control of the trustees of that district, who shall constitute an advisory and limited policy-forming body for that district, as set forth in §§230.34-230.43."

Under §119.01, F. S., citizens constituting members of the Parent Teachers' Association have the right to inspect the records of the county superintendent of public instruction and to cause an audit to be made of the same by a certified public accountant. Such audit should be made under circumstances so as not to unduly interfere with the performance of the official duties of the superintendent. If necessary, the county school board would be authorized to prescribe reasonable conditions under which such an audit could be made.

There is no legal objection to the county school board or the trustees of the school district or the superintendent making use of the findings of the audit for the purpose of improving the school system of the county, although there is no specific duty on such officials to do so.

In view of the foregoing, it is my opinion that your questions must both be answered in the affirmative.

July 17, 1952—052-220.

COUNTY—MUNICIPALITY—BOARD OF PUBLIC
INSTRUCTION—RECREATIONAL FACILITIES
OPERATED JOINTLY

QUESTIONS: 1. May a county, a municipality and the

board of public instruction of a county jointly establish, own, operate and maintain a recreational system, under Ch. 418, F. S.?

2. If the above question is answered in the negative, then may the said board of public instruction lease or otherwise acquire facilities for school purposes in recreational centers established, owned, operated and maintained by the county, or by a municipality, or by both?

To: *Honorable Thomas D. Bailey, Superintendent of Public Instruction:*

The legislature of this state is required to provide for a uniform system of public free schools and for the liberal maintenance thereof (§1, Art. XII, State Constitution). The county school fund (established by §9, Art. XII, of the State Constitution) is solely for the support and maintenance of public free schools and may not be diverted to other than school purposes (§§9 and 13, Art. XII, State Constitution).

The establishment and operation of the public free schools in this State is regulated by the School Code of the State (Ch. 227-237, F. S.) which code is liberally construed (§227.04). The school plant not only includes the actual school building but also *playgrounds and equipment, athletic fields, gymnasiums*, and "other equipment wherever located necessary to provide an adequate school program" (§227.13). The school system of a county includes all *services and activities related to education* which are under the direction of the school officials (§230.02). The board of public instruction of the county is the contracting agency for the county school system and as such may enter into lawful contracts (§230.22). The said board may acquire real and personal property by purchase, condemnation, *lease* and otherwise, and may select and purchase, school sites, *playgrounds and recreational areas*, and may rent buildings when necessary (§230.23). The said county board may "cooperate with federal, state, county and municipal agencies in the enforcement of laws and regulations pertaining to vocational education, vocational rehabilitation, *physical restoration of children and adults, health of pupils, school attendance, child welfare, and other matters relating to education.*" (§230.23). See also §230.33 (15), F. S. The state board is authorized "to approve plans for cooperating with other agencies, federal, state, county and municipal . . . for the improvement of conditions relating to the welfare of schools" (§229.08). In brief the authority of the county school board is very broad in its relation to the operation of the county schools; they may acquire school sites, playgrounds, recreational areas, athletic fields, gymnasiums, and other needed school equipment, by purchase, *lease* or otherwise.

Formerly schools confined their work to the training of the mind; however, in recent times they have extended this training to physical as well as mental development. In short our concept of education has been broadened in recent times. The construction of gymnasiums and athletic fields (Annotation in 69 A.L.R. 871) and of auditoriums and stadiums (Annotation in 173 A.L.R. 420) have been held to be connected with the intent and purposes of modern education. It has also been held that such auditoriums, stadiums, gymnasiums and athletic fields need not be physically connected with the school grounds (47 Am. Jur. 351 and 352, §75, and especially Note 5).

Chapter 418, F.S., provides for the establishment of playgrounds and recreational centers, and their maintenance, operation and supervision. Section 418.05 of said statutes provides that "any two or more municipalities or counties may jointly provide, establish, maintain and conduct a recreational system and acquire property for and establish and maintain playgrounds, recreation centers and other recreational facilities and activities. *Any school board may join with any municipality in conducting and maintaining a recreational system.*" See also our opinion number 475, dated October 5, 1949, relative to the establishment of a swimming pool jointly by a municipality and a county board of public instruction.

The use of county school funds being limited to the support and maintenance of the public free schools of the county and for no other purpose, it seems clear that the county board cannot divert any of such funds for the establishment and operation of playgrounds and recreational centers, unless there be some use of such facilities for school purposes in addition to the usual use and purposes of the facilities. The use of such facilities by the schools will have to be something in addition to the general use of the facility by the public. The school board may not pay for a use of the facility that the school children already have as members of the public entitled to use the facility. Because of this limitation the cooperation, by the county school board with the county or a municipality or both, is limited. The school board's use of the facility must be an educational use. The school board's *exclusive right* to the use of the facility for training its football, basketball, base ball, and other teams during certain stated periods of time would seem to be within the rule; as the board might maintain its own facility for these purposes. The exclusive use, during certain stated periods of time, of the facility or a part thereof for classes in physical education and similar training would also appear to be for an educational purpose. Other examples might also be given. Doubtless the school board would be within its rights in leasing such facilities for such purposes where it has no such facility of its own.

From the above and foregoing authorities and observations we see no reason why the county school board might not cooperate with the county and a municipality in the operation and maintenance of a recreational facility so long as the school board's cooperation is for an exclusive educational purpose in addition to the general use of the facility by the public. Although such cooperation may be possible, its practical application may be difficult because of the above mentioned limitations. The first question is, therefore, conditionally answered in the affirmative.

The more practical method would seem to be for the county and municipality to establish the facility and for the school board to lease such use of the facility as it may need for educational purposes. This in effect answers the second question.

August 6, 1951—051-261.

VOCATIONAL SCHOOLS—ROOM RENT AND MEALS—
HOTEL COMMISSION LICENSE—
SALES TAX

QUESTIONS: 1. The Board of Public Instruction of Dade

County, in a vocational school, and as a part of its training of hotel personnel, rents rooms and serves meals to actual guests who pay for their rooms and their meals as they would in any hotel. Are these operations under the jurisdiction of the Hotel Commission and is it necessary to obtain a license from the Hotel Commission?

2. You also inquire whether the Board of Public Instruction is required to collect sales taxes in connection with its charges for such rooms or sale of meals?

To: Miss Lucille M. Von Arx, Attorney for Board of Public Instruction, Dade County, Miami, Florida:

You point out that, as a part of its school system, the Board of Public Instruction of Dade County operates the Lindsey-Hopkins Vocational School, which is a trade school. Among other courses, the school offers complete hotel personnel training, including specifically matters relating to the renting of hotel rooms and serving meals to guests. In order to realistically and effectively carry out their program of training, the school rents rooms and serves meals to actual guests. In this manner, the student personnel get real problems as they arise in the conduct of a hotel and restaurant and learn how to properly handle them.

The purpose of the Hotel Commission is to protect the public, and the County Board's operations described above are within the jurisdiction of the Hotel Commission, and subject to its rules and regulations. The Hotel Commission has the duty of inspecting and checking your Board's hotel and restaurant operations to the same extent as any other hotel or restaurant. There being no evidence of legislative intent to the contrary, your Board, as a public agency, is not required to obtain a license or pay the fees therefor. Means of enforcing their rules and regulations would be available to the Hotel Commission in the event your Board should violate those regulations.

The 1951 amendment of the Sales Tax Act answers your second question. Prior to the amendment, §212.08, which relates to sales tax exemptions, read:

"There shall likewise be exempted all sales made to or by the United States Government, the State of Florida, or any county or municipality within the State, and all sales made to or by any governmental unit, state or federal, and including sales made to contractors of tangible personal property going into and becoming a part of public works and projects owned by any such government or governmental unit . . ."

It will be observed that the underscored words were omitted from the 1951 amendment of the Section, which now reads:

"There shall also be exempted all sales made to the United States Government, the State of Florida, or any county, municipality or political subdivision of the State and including sales of tangible personal property made to contractors . . ."

Thus, the removal from the exemption statute of sales made by political subdivisions of the State implies legislative intent that

public agencies should collect sales taxes. It is my opinion that it is your Board's duty to collect sales taxes to the same extent as any privately owned hotel or restaurant.

September 24, 1951—051-328.

COUNTY SCHOOL BOARD—CHAIRMAN—
VICE-CHAIRMAN—SURETY BOND

QUESTIONS: 1. Should a vice-chairman of a county school board elected under the provisions of the above chapter be required to furnish an additional surety bond covering exercise of his duties when acting as chairman?

2. If the answer to question 1 should be in the affirmative, should the amount of the additional bond be the same as provided in §237.31 (2)?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

Since under the provisions of §§1 and 2, Chapter 26905, Laws of 1951, (§230.151 F.S.) a vice-chairman of a county school board would "exercise all the powers and perform all duties of the chairman" under certain circumstances, it is my opinion that the same amount of bond as provided in §237.31 (2) F.S., should be required of both offices.

It should be noted that Ch. 26905 is permissive rather than mandatory. If, however, a county school board should decide to elect a vice-chairman, I believe that the amount of the bond of the vice-chairman should be the same as that required of the chairman. Your first question is therefore answered in the affirmative.

Your second question is answered in the affirmative, as stated above.

September 26, 1951—051-335.

COUNTY SCHOOL BOARD—MEMBER AS BANK
STOCKHOLDER—LOAN COMPETITIVE BID BASIS

QUESTION: May a county school board borrow money from a bank if one of the board members is a stockholder in the bank?

To: *Honorable C. M. Gay, State Comptroller:*

It should be noted that §839.09 carries a criminal penalty and as such must be strictly construed.

Section 230.23 (12) (i) is distinguished from §839.09 in that the former includes the word "services" as coming within the act, whereas the latter does not.

It does not appear that a Florida court has ruled on the question presented, which resolves itself largely into a determination as to whether a bank loan comes within the meaning of either of the statutes cited.

The words "supplies," "goods," "materials," and "merchandise" all appear to be used more or less interchangeably to convey

the meaning of articles having an "intrinsic value in bulk, weight or measure." See 27 Words and Phrases 80. "Merchandise," as used in a charter incorporating a steamboat company for the transportation of 'merchandise,' does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold. *Indiana Bond Co. v. Oge*, 54 N. E. 407; *Citizens Bank v. Nantucket Steamboat Co.*, 5 Fed. Cas. 719; 27 Words and Phrases 80. "Shares of stock are not 'goods' within meaning of sales act. Personal Property Law. *Broderick v. Aaron*, 273 N.Y.S. 641, 18 Words and Phrases 527." "Uniform Sales Act held not to apply to sales of bonds; they not being 'goods,' within statutory definition. *Morris F. Fox & Co. vs. Liaman (Wis.)*, 240 N. W. 809, 812, 18 Words and Phrases 523." "Statute forbidding purchase of supplies from firm in which any member of municipal or county board is directly or indirectly interested held not to apply to purchase of bonds by city bond trustees. *City of Leesburg vs. Ware, et al (Fla.)*, 153 So. 87."

It seems to me that under a strict interpretation of the law, it would be doubtful that a bank loan could be defined as being either "goods, supplies or services," bank loans being more or less in a category of their own and serving a special purpose.

There remains for consideration the question of public policy and the fiduciary relationship imposed upon public officials in the discharge of their duties.

In the case of *Stubbs vs. Florida State Finance Company*, 118 Fla. 450, 159 So. 527, text 528, it was held that "a public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested, or as to which he is acting as the agent for another, whose interest is opposed to that of the governmental unit which the official represents, thus causing him to occupy a position where his duty as a public official is in conflict with his personal interest. This principle has many times been recognized by this court and is not only founded upon a wholesome public policy." In this connection see also 67 C.J.S. 406, §116. "No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle." (*Fisher v. Grady*, 131 Fla. 1, 178 So. 852, text 860).

Although from the above it might reasonably appear that a bank loan negotiated with a school board one of whose members was a stockholder in the bank, might be against public policy, consideration must also be given to the practical aspects of the problem.

Loans of this nature would not ordinarily vary to any appreciable degree in interest rates. It is entirely possible that in some counties only one local bank would be available to make the desired loan to the board.

In enacting the statutes in question the legislature clearly intended to place safeguards against the abuse of power vested in members of public boards. I do not believe, however, that the legislature intended that these statutory safeguards should be carried to the unreasonable extent of discouraging local business men and women from serving on board such as the school board simply because they might own stock in various business concerns which necessarily must do business with the board.

In other words, the application of the sections cited must be tempered with common sense if their intent is to be carried out and still not seriously interfere with the operation of various public services involved.

Since there is doubt, however, as to the applicability of the law in the present instance, it seems to me that a logical solution to the problem and one which would remove any reasonable possibility of doubt as to the propriety of the loan from the standpoint of public policy, would be for the board to secure the loan on a competitive bid basis.

If this is done, I do not believe that there could be any valid criticism of the transaction, even though one of the board members was a stockholder in the bank which bid successfully and made the loan. Otherwise, such a transaction might be suspect even though not conclusively contrary to law.

Your question is therefore answered in the affirmative, subject to the above observations and suggestions.

November 15, 1951—051-412.

BOARD PUBLIC INSTRUCTION—MEMBERS AS OIL DISTRIBUTORS—PURCHASES

QUESTIONS: 1. May the Board of Public Instruction of Escambia County purchase merchandise from an Oil Company (Russ Oil Company) or automobile accessory and parts from other companies when a member of the school board (W. J. Faris) is the lessee of said Oil Company and operates a service station upon the property of the Oil Company selling the products of such Company and the parts and accessories of the other companies, but who does not receive any salary, dividend, percentage of profit or any other financial gain from any sales made by the Oil Company or the parts and accessory companies?

2. May the Board of Public Instruction of Escambia County purchase merchandise from an Oil Company (Sherrill Oil Company) or automobile parts and accessory companies when such Oil Company and Companies sell their products through a member of the School Board (Carl E. Jones) as an independent contractor with such Company or Companies and when said member-contractor has complete control over his employees, owns his own service stations, pumps, trucks, etc., pays his own insurance and workmen's compensation and receives absolutely no salary, dividend, percentage of profit or any other financial gains from any sales made by such Company or Companies?"

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Upon receipt of your request, I asked Mr. William Hoffman,

Attorney for the Board of Public Instruction of Escambia County, to make an investigation of the particular circumstances involved. He advises me that the following appear to be the facts which must be considered.

School board member W. J. Faris operates his business as an independent dealer. He has no connection with any of the various firms in question other than to rent a building from the Russ Oil Company and to buy and resell various merchandise from this and various other firms. Mr. Faris does not sell any merchandise to the school board either directly or indirectly. Although the Russ Oil Company and other companies from whom Mr. Faris purchases merchandise to sell to the school board, Mr. Faris has no interest either direct or indirect in said sales and does not profit from said sales in any manner.

Basing my opinion on the above recited facts as furnished to this office, I do not believe that there is any connection between the private business operated by Mr. Faris and sales which are made to the school board by various supply companies from whom Mr. Faris also makes purchases. I do not believe that §839.09, F. S., is applicable and your first question is therefore answered in the affirmative.

The facts related by Mr. Hoffman with regard to your second question are substantially the same in so far as legal principles are concerned, as those involved in your first question; the principal distinction being that the board member, Mr. C. E. Jones, is a distributor rather than a lessee. I am advised that none of the products distributed by Mr. Jones are sold by him either directly or indirectly to the school board. Although some of the products handled by Mr. Jones are sold to the board, they are sold by firms in which Mr. Jones has no interest. Your second question is answered in the affirmative.

December 19, 1952—052-328.

SCHOOL ATTENDANCE—MARRIED PUPILS— PROHIBITION

QUESTION: 1. Does a county board of public instruction have authority to prohibit married children from attending or to dismiss pupils who marry from further attendance as pupils in our public schools?

2. Would the circumstances of prospective motherhood of a married pupil justify a school board in barring such pupil from public school attendance?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

School attendance between the ages of 7 and 16 is required by §232.01, F.S. Children within the compulsory attendance age limits may under the provisions of §230.06, F.S. obtain a valid certificate of exemption of school attendance in certain circumstances.

All public school pupils within or above the age maximum limit of compulsory school attendance are subject to the rules for the administration and the supervision of instruction as provided in

§§230.24-230.33, F.S., which delegate this authority to the county superintendent.

All pupils are subject to law and rules and regulations of the state board and of the county board, as provided in §232.25, F.S. and to the authority of principal or teacher or others, as provided in §232.26, F.S.

We find in §232.26 the means by which a pupil may be suspended for a period of not more than ten days and that no suspension shall be made a dismissal unless so ordered by the county board, in a resolution adopted and spread upon its minutes. A pupil may be suspended by the principal or by any member of the instructional staff for "willful disobedience, for open defiance of authority of a member of his staff, for the use of profane or obscene language, or for other misconduct."

In the one case found on the subject of the attendance of married children in public schools, it was held in the case of a married girl between 15 and 16 years of age, who was permitted to attend the public school, that the ordinance in question, forbidding the attendance of married pupils in the public school, was so unreasonable and unjust as to amount to an abuse of discretion in its adoption. *McLeon v. State*, 122 So. 737, 154 Miss. 468, 63 ALR 1161.

Rules which will deprive a pupil of public school privilege, except as a punishment for an offense against good morals or school decorum have been held to be unreasonable and invalid. C.J.S. 79, par. 495.

Granting that the presumption is always in favor of the reasonableness and propriety of any rule promulgated by a county board of public instruction, to be within its legal authority, the validity of the rule is a question of law for the courts.

As marriage is a domestic relation sanctioned by religion and favored by law, the effect of a married pupil attending the public schools would ordinarily appear to be good, rather than bad, and a married person could reasonably be expected to exercise a refining influence on the other pupils of the school. It is commendable in married persons of school age to further their education and thereby be better fitted for life's work and its duties.

With the above observations in mind and in consideration of the State Board Regulation adopted 1 April 1941, §228.16 (2), relating to admission of persons over 21 years of age who reside in the state to complete their high school work in any of our high schools, the following conclusion is evident:

It is questionable that a rule to bar married children from attending public schools would be reasonable, or be to the best interest of the school or pupils and could be enforceable.

In answer to your second question, in the circumstances where prospective motherhood is anticipated, we find quite a number of factors involved. In the case of a prospective mother who at the time is also within the compulsory school attendance age limit, it may be advisable or necessary for reasons of health of the pupil to invoke the exemption from school attendance as provided for in §230.06, which allows the pupil to obtain a valid certificate of exemption from attending school, issued by the county superintendent

upon a submission to him of a statement from the local health officer, if he be also a licensed physician, or in lieu thereof from a licensed physician designated by the board in accordance with the provisions in said §230.06, F.S.

In those cases of prospective motherhood of pupils over the compulsory school attendance age, there appears to be no reason to bar such pupils from school attendance in the early stages of pregnancy. There are many reasons why a rule of school attendance exemption should be enforced in the latter stages of pregnancy for the benefit of the expectant mother and child, as well as for the possible questionable consequences of close association with children of tender years. The problem raised in your second question should not, I believe, be the subject of a general school board regulation. Such problems should be determined in the light of the specific circumstances involved in each case and should be solved by arrangements with the individual pupil, the attending physician, together with the teachers and parents of the pupil.

PERSONNEL OF SCHOOL SYSTEM

March 21, 1952—052-102.

INVALID TEACHER—SOCIAL SECURITY PAYMENTS— RETIREMENT BENEFITS

STATEMENT and QUESTION: A former Florida teacher has applied for a teacher's pension under §§231.50 and 231.51, F. S. The applicant is bedridden and I assume from the information submitted in your letter that the applicant is not receiving a retirement allowance or pension under any other law of this state. I further assume from the information submitted that the applicant has never been eligible to become a member of the "teacher retirement system of the State of Florida." Your letter indicates that the only other income which is at present available to the applicant is a social security payment which the applicant receives, said payment amounting to \$62.00. Although your letter does not so state, I assume that the above mentioned \$62.00 social security benefit is a monthly payment. The applicant contends that the \$62.00 social security payment does not constitute "a means of support" within the meaning of the law, particularly in view of the fact that applicant is an invalid confined to his bed.

Is an applicant for a pension as provided by §231.50, F. S., precluded from the benefits provided by said section if said applicant receives a monthly payment of \$62.00 from the Federal Government under the provisions of the social security act?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Social security (see paragraph 402, Chapter 7, page 477, United States Code Annotated, 41 to 42, Public Contracts, Public Health & Welfare) is defined as "old age and survivors insurance benefit payments—old age insurance benefits."

The purpose of the old age benefits of the social security program is to provide funds through contributions by employer and employee for decent support of elderly workmen who have ceased to labor. *Ewing v. Black*, C. A. Tenn. 1949, 172 F. 2d 331, 6 A.L.R. 2d 953. "The hope behind this statute is to save men

and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near."

With the above definition for insurance in mind, we may view social security as an attempt by Congress to alleviate to some extent the national ill of unemployment under the general welfare clause, whether it results from the infirmities of old age, or ill health as is evidenced in the applicant's case.

Section 231.50, F. S., provides, in brief, that any person who has served as a teacher, or county superintendent of public instruction, or both, for an aggregate period of thirty-five or more years and is unable to do and perform any vocational work to earn a living and is without support may qualify for a pension during the remainder of his life under this section, provided he can furnish the proof as required by §231.51, F. S., and further provided that the applicant is not receiving any other retirement allowance or pension under any other law of this state and who is not now eligible or has ever been eligible to become a member of the "teacher's retirement system of the State of Florida." In my opinion, the language used by the legislature in §231.50 "incapacitated to do and perform any vocational work sufficient to earn a livelihood, and is without means of support" must be construed to mean that the applicant is lacking in present earning capacity through his own efforts to support himself or that he lacks income from any source sufficient to maintain himself without resorting to charity. I do not believe it was the intent of the Legislature to penalize the applicant by precluding him from the benefits of this act if he owns a modest annuity acquired through his own earnings and savings if such annuity is insufficient to afford him the necessities of life—which would seem to be the case in this instance.

Assuming that the applicant in question is not now receiving any benefits from any retirement system of the State of Florida and is otherwise qualified to receive the pension under §§231.50 and 231.51, F. S., there is nothing, in my opinion, within the said sections that would necessarily conflict with the purpose of the social security act to the extent that he may not qualify to receive the state pension as provided.

In the final analysis, therefore, I believe that the teacher's retirement board must consider the facts available in this particular case and if in its discretion said board reaches the conclusion that the \$62.00 social security payment received by applicant is not a sufficient "means of support" for the applicant in his specific circumstances, then I believe the board would be acting within its authority to authorize the payment to said applicant of the state pension contemplated.

Subject to the above observations, your question is answered in the negative.

May 8, 1951—051-107.

**COUNTY SUPERINTENDENTS—PROFESSIONAL
ADMINISTRATIVE ASSISTANTS—CONTINUING
CONTRACTS**

QUESTION: Does §231.36, F. S., contemplate the issuing of

continuing contracts to professional administrative assistants functioning in the office of the county superintendent but not engaged directly in the instructional field; provided, they meet the conditions of this section as to number of years of previous service and hold a regular certificate based at least on graduation from a standard four year college?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

It is my opinion that §231.36, F. S., extends the continuing contract privileges provided therein to the type of employees considered in your question. Your question is therefore answered in the affirmative.

May 16, 1951—051-116.

COUNTY BOARD PUBLIC INSTRUCTION—SCHOOL NURSE—EMPLOYMENT

QUESTION: Is it legal for a County Board of Public Instruction to use school funds to pay the salary and/or expenses of a school nurse whose duties are strictly those of a nurse, are not instructional in their nature, and where the nurse is entirely under the supervision of the School Board?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Assuming that the employment of a school nurse by the county board of public instruction conforms to the requirements of §213.34, F. S., your question is answered in the affirmative.

July 2, 1952—052-206.

COUNTY SCHOOL BOARD—TEACHERS—EMPLOYMENT—CONTINUING CONTRACTS

STATEMENT and QUESTIONS: The State Board has prescribed a contract for use in Broward county, and clause one (1) of that contract provides that "the county board enters into this contract of continuing employment with the employee pursuant to the resolution of the county board heretofore adopted, whereby the employee was appointed and employed as above set out."

(1) Would the construction of this clause be that the county board must adopt a resolution approving the issuance of continuing contracts?

(2) If such resolution was not adopted by the county board, would the continuing contracts issued be valid and binding upon the board and the employee?

To: Honorable Ted Davis, Attorney for School Board, Broward County, Hollywood, Florida:

The language used in the form for continuing contracts prescribed by the State Board of Education could not alter the requirements and mandatory provisions of §231.36, F. S., which provides, in part:

"Effective July 1, 1951, each member of the instructional and administrative staff in each county school

system, except in counties operating under local, special or general tenure laws with stated population application, who holds a regular certificate based at least on graduation from a standard four year college, who has completed three years of service in a county of the state and who has been reappointed in such county for the fourth successive year, shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board; . . ."

Even though the paragraphs in the contract which you refer to were inconsistent with the statute, the statute would prevail and it is the mandatory duty of county school boards to issue continuing contracts to teachers who qualify under the terms of the statute, even though the county school board has refused to adopt a resolution implementing the statute.

I do not believe, however, that there is an inconsistency between the contract clause in question and the statute. It seems to me that the clause in the contract to which you refer (No. 1) refers to prior action of the school board in employing the teacher for the requisite number of years provided by law as a necessary factor in determining eligibility for a continuing contract.

Your questions are therefore answered as follows:

Question 1 is answered in the negative.

Question 2 is answered in the affirmative.

COURSES OF STUDY AND INSTRUCTIONAL AIDS

August 5, 1952—052-239.

TEXTBOOKS LOST OR DAMAGED—SALES—COLLECTIONS

QUESTIONS: 1. Is the collection for a lost or damaged book in the nature of an assessed fine, or does the transaction in its effect constitute a book sale?

2. Would the provisions in the statute governing disposition of proceeds from book sales also govern the disposition and use of money collected for lost or damaged books?

3. If collections for lost and damaged books are not to be disposed and used as are the proceeds from book sales, what is the legal intent with respect to their disposition and use?

4. Does the State Textbook Fund in which proceeds from book sales are to be deposited mean the current general revenue appropriation for textbooks or does it mean the State Textbook Trust Fund created by the State Budget Commission under §282.002, F. S.?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

No Florida cases were found defining the word "fine" generally. However, the use of the word "collect" instead of the word "fine" in the provisions of §233.46 (5) is significant. It would

seem to indicate that the legislature contemplated a book sale, in effect, rather than a true assessed fine. This interpretation is aided by the fact that the statute equates the sale price to the pupil or parent to that of the replacement cost value of the book at the time it is lost or damaged. Such would not be the case if the legislature intended to provide for a fine or penalty.

Many school children are also of tender years and in contemplation of law there is a presumption against the intent to commit a willful crime or tort on the part of such children. It would seem clear, then, that the legislature intended that the contingencies of §233.46 (5), F. S., should constitute a form of statutory sale rather than a fine. This answers your first and third questions.

A careful reading of the provisions of §233.46 (5) and (6), F. S., leads me to believe that the legislature intended that the dispositive provisions of §233.46 (6), F. S., should govern and control the ultimate disposition of all funds for lost and damaged books forwarded by the county superintendent under the provisions of §233.46 (5). Such a conclusion is indicated by the foregoing determination that the transactions under §233.46 (5), F. S., constitute in effect a statutory book sale. The principle of law involved is stated succinctly in Crawford, Statutory Construction (1940) as follows:

"Inasmuch as the language of a statute constitutes the depository or reservoir of the legislative intent, in order to ascertain or discover that intent, the statute must be considered as a whole, just as it is necessary to consider a sentence in its entirety in order to grasp its true meaning. Consequently, effect and meaning must be given to every part of the statute which is being subjected to the process of construction,—to every *section*, sentence, clause, phrase and word. This is a principle based upon human experience with man's modes of expression and the inevitable limitations of our language Abstractly, a word or phrase might easily convey a meaning quite different from the one actually intended and evident when the word or phrase is considered with those with which it is associated. *The same is equally true with sentences and paragraphs* The various words, phrases, clauses, and sentences make up the framework which supports the legislative intent. They are mutually dependent. Co-operatively, they convey the ultimate idea.

"Moreover, a statute should be construed as a whole because it is not to be presumed that the legislature has used any useless words, *and because it is a dangerous practice to base the construction upon only a part of it*, since one portion may be qualified by other portions" (Emphasis supplied)

Any other conclusion is, in my opinion, negatived by the express mandate of §215.31, F. S., which provides, in part, that ". . . revenue, including licenses, fees, imposts, or exactions collected or received under the authority of the laws of the State of Florida by each and every *state official* . . . shall be promptly deposited in the state treasury" (Emphasis supplied)

It is therefore my opinion that if a reasonable conclusion is to be reached, the provisions of §233.46 (6), F. S., governs and controls the disposition of funds forwarded by the county superintendents under the provisions of §233.46, (5), F. S. This answers your second question.

Section 233.46 (6), F. S., specifically provides that "The state treasurer shall deposit all such remittances in the state textbook fund and the sums or amounts so deposited shall be made available for textbook purchases under the limitations prescribed in §233.46, Florida Statutes."

This would not circumscribe the intent and mandate of §233.46 (6), F. S., that "Each such sum or amount shall, in the offices of the state superintendent of public instruction, be credited as an addition to the textbook allocation account of the county making such remittance." All such book sale amounts remitted by a county should be accredited as an addition to such county's textbook allocation account in the general textbook fund. As such, it would be available to the county in any accounting period of the biennium. Nor is there anything inconsistent in this interpretation with the making available to any county of the legal part of any unused credit in the state textbook fund as allocated by the state superintendent pursuant to §§233.34, 233.46 (5) and 233.46 (6), F. S., for the purposes therein provided.

The proceeds from book sales under the provisions of §233.46 (5) and (6), F. S., must properly be deposited in the current textbook appropriation fund. When it is recalled that all such book sale proceeds have their origin in credits allocated in the state textbook fund by the state superintendent pursuant to the provisions of §233.34, F. S., it is only reasonable that such remittances be returned to the state textbook fund from whence they originated for use during the current appropriation period. Your fourth question is answered accordingly.

COMPULSORY SCHOOL ATTENDANCE; CHILD WELFARE

November 5, 1952—052-305.

COUNTY BOARD PUBLIC INSTRUCTION—FUNDS DISBURSEMENT—HEALTH SERVICES IN PUBLIC SCHOOLS

QUESTION: May a County Board of Public Instruction disburse school funds payable to the State Board of Health through their county health units to assist these units in the performance of their function in providing health services in the public schools?

To: Honorable Thomas D. Bailey, Superintendent Public Instruction, Department of Education:

Under the State Constitution the Legislature is required to provide for a uniform system of public free schools and to provide for the liberal maintenance of the same, (§1, Art. XII). The County School Fund is provided for by the Constitution which requires that it be apportioned and distributed as may be provided by law to be "disbursed by the county board of public instruction solely for the support and maintenance of public free schools." (§9, Art. XII).

No statute may be enacted authorizing the diversion of any county school funds to any other than school purposes. (§13, Art. XII).

Under the terms of the state school code its provisions are to be liberally construed "to the end that its objects may be effected and public education may be promoted . . ." (§227.04, F.S.). The State Board of Education is authorized to approve plans for cooperation with other appropriated federal, state, county and municipal agencies "for the improvement of conditions relating to the welfare of schools." (§229.08 (11), F.S.). The County school system includes all public schools, classes and courses of instruction "and all services and activities directly related to education in that county which are under the direction of the county school officials." (§230.02, F.S.). The County Board of public instruction is the contracting agency of the county school system and as such may enter into any lawful contract (§230.22 (4), F.S.). It may also perform all duties and responsibilities "assigned to it by law or by regulations of the state board and, in addition thereto, those which it may find to be necessary for the improvement of the county school system in carrying out the purposes and objectives of the school code" (§230.22 (5), F.S.). The county board is given authority to "exercise all powers and perform all duties" regarding the "proper attention to health, safety, and other matters relating to the welfare of children in the following fields, as prescribed in Chapter 232, hereof . . .", to "provide for all children of school age in the county to have periodic physical and dental examinations and, insofar, as practicable, arrange and cooperate with other organizations for the prompt treatment of all pupils who are in need of remedial and preventive treatment . . ." (§230.23 (8) (f), F.S.), and specifically to "take steps to insure children adequate educational facilities through the financial procedure authorized . . . and as prescribed . . ." including the contracting "for materials, supplies, and services needed . . ." (§230.23 (12) (i), F.S.). The county board is also directed to "Cooperate with federal, state, county, and municipal agencies in the enforcement of laws and regulations pertaining to . . . health of pupils . . . child welfare, and other matters relating to education." (§230.23 (15), F.S.). And §230.23 (18), F.S., in pertinent part significantly provides that the county board shall "assume such other responsibilities and exercises such powers and perform such duties . . . as, in the opinion of the county board, are necessary to provide for the more efficient operation of the county school system in carrying out the purposes and objectives of the school code."

Sections 232.29, 232.30, 232.31, and 232.32, generally provide for the medical examination of school children under the supervision of the state board of health, for the county school boards and health authorities to cooperate, and for the county school board to employ certain medical personnel and to provide certain medical services when adequate medical inspection service is not provided by the county health authorities or by the state board of health.

A careful consideration of all the foregoing statutes pertaining to the school health program would seem to indicate that a mutual cooperation and contribution of energy, materials and understanding on the part of the State Board of Health and State Department of Education is anticipated.

Generally speaking, the local full time health unit is the agency

which should organize and be responsible for the health examination of school children as required by §232.29, F.S. In counties which are without adequate health service facilities the school authorities have the authority and are responsible for securing the advice, assistance and services of the medical and dental societies toward meeting the requirements for the medical inspection of school children as provided for in §232.29, and §232.31, F.S.

As the county public school fund must be used solely for the support and maintenance of the public free schools and may not be diverted to any other than school purposes it seems clear that the county board of public instruction may not donate any of such funds to a separate and distinct governmental agency even for such a worthy purpose as public health (§9 and 13, Art. XII, State Constitution). Nor could the school authorities purchase necessary or desired services of county health units in counties in which county health units have been provided, are in active operation, and are providing as a part of the county health unit's program a periodic medical inspection of school children and other necessary health services contemplated by the Florida School Code (§232.32, F.S.). Such an interpretation seems reasonable in that the financial maintenance of the county health units and their programs are separately provided for apart from school funds (Ch. 154, F.S.).

However, §232.31, F.S., significantly authorizes the county board to "employ one or more county school physicians or school nurses" in any county "in which adequate medical inspection service is not provided by county health authorities or by the state board of health." I think that since the county board might employ or contract for adequate medical personnel to discharge its responsibilities under §§232.29-232.32, F.S., there would be no objection to a reasonable agreement or contract between a county board of public instruction and a county health unit whereby the former undertook to pay part or all of the costs incurred by the county health unit to furnishing the educational health services which are declared to be a school purpose and responsibility by law, provided, the county health unit cannot undertake to provide a medical inspection of school children and other required services as a part of its county health program.

If such an agreement is entered into between a county health unit and a school board, it should of course be in writing and specify the specific services to be rendered by the health unit in return for the funds paid out by the county school board and the consideration paid must represent the fair contractual value of the services rendered.

Subject to the reservations I have indicated, your question is accordingly answered in the affirmative.

TRANSPORTATION OF SCHOOL CHILDREN

August 31, 1951—051-293.

SCHOOL BUS ROUTE—TRANSPORTATION OF CHILDREN— RECIPROCAL AGREEMENT BETWEEN COUNTIES

QUESTIONS: 1. Is it contrary to law for Levy County pupils to ride a Citrus County bus from the Citrus County side

of the Withlacoochee River to the Crystal River school in Citrus County in the absence of a valid agreement between the two counties?

2. Can a Citrus County bus go into the Yankeetown community in Levy County without a contract between the Levy and Citrus County school boards?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Section 234.10 (6), Florida Statutes, provides:

"Where it is practicable to extend a school bus route to serve any territory which lies in more than one county so that pupils living in the extended area to be served by the bus may have improved educational facilities, county boards of the respective counties shall cooperate and make such mutual plans and agreements as necessary to make these improved facilities available to the pupils. *Pupils shall not be transported at public expense from one county to or from the schools of another county, unless a valid agreement exists between the respective county boards.* This agreement shall state the responsibility of each county board for operation of the bus and maintenance of the daily schedule. Whenever a bus crosses a county line, all rules and regulations of the county in which it is traveling shall be observed, unless otherwise provided in the agreement between the county boards." (Emphasis supplied)

I believe that it was the intent of the legislature to provide that each county shall provide transportation for its pupils under ordinary circumstances.

If, however, there are unusual circumstances which make it more desirable or practical for the pupils of one county to attend school in another county, provision is made for this eventuality by the above cited section, provided that a valid agreement is entered into by the counties involved.

An interpretation of this act holding that the children of one county could meet the school buses of another county at the county line and be transported to school without an agreement providing for such an arrangement between the school boards of the respective counties would defeat the purpose of the act which is obviously to provide uniformity in the public schools throughout the state and to avoid confusion as to the attendance areas covered by the schools of different counties.

Your first question is answered in the affirmative.

Your second question is answered in the negative.

September 24, 1951—051-329.

COUNTY COMMISSIONERS—SCHOOL CHILDREN—ACCIDENTS—EMPLOYMENT OF TRAFFIC GUARDS

QUESTION: May a board of county commissioners employ traffic guards on a temporary or part-time basis for the purpose of

preventing accidents near schools on busy thoroughfares during hours of the day when children are either leaving or arriving at school?

To: Honorable William H. Dial, Attorney, Board of County Commissioners, Orlando, Florida:

Although it is true that generally speaking counties are limited in the expenditure of funds to those purposes provided by statute, I am of the opinion that a very definite county purpose would be served by the employment of guards within the meaning of your question.

Section 234.13, F.S., it seems to me, indicates a legislative intent to charge both counties and municipalities with responsibility for the safety of its school children while using streets, sidewalks and public roads.

It is common knowledge that an unusual traffic hazard is created in the vicinity of schools during those hours of the day when large numbers of children are forced to cross busy streets and highways in order to attend school. I believe that it is at least to some extent the responsibility of the county to take reasonable precautions to insure the safety of school children under such conditions and that in seeking to carry out this responsibility a county could properly expend such funds as are reasonably necessary in accomplishing this purpose.

December 14, 1951—051-456.

COUNTY SUPERINTENDENTS—SCHOOL BUSES—HIGHWAY HAZARDS

QUESTION: Does a school board have legal authority to employ an individual to flag a dangerous crossing for school buses at a point not within a municipality on a secondary highway where efforts to have signal lights installed have met with no success?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

I know of no law which authorizes a county school system to employ personnel for the sole purpose of directing traffic or to act as a watchman at a railroad crossing.

Sections 234.12 and 234.13, F.S., apparently place the responsibility on municipal and county authorities for safeguarding school children on public streets and highways while en route to or from school.

If under §234.12, F.S., the city or county authorities, as the case may be, do not or cannot, take appropriate action promptly to correct the hazard in question, then it is the duty of the county superintendent of public instruction to "take or cause to be taken such precautions as are necessary to safeguard pupils who are transported at public expense."

I would hesitate to attempt to suggest a specific course of procedure for a county school superintendent to follow under such circumstances since the facilities and personnel available to school superintendents vary in each county.

It would seem, however, that a temporary arrangement could be made by the superintendent for one of the school board's regular employees to be delegated the duty of watching at the railroad crossing during the time when school buses must cross it, along with his or her other duties until such time as a permanent solution to the problem could be found by the county commissioners.

Subject to the above observations, your question is answered in the affirmative.

THE SCHOOL PLANT

July 22, 1952—052-227.

COUNTY SCHOOL BOARD—CONTRACTS—BIDS—LEGAL ADVERTISEMENTS

QUESTIONS: 1. After the publication of legal notice for the submission of bids pursuant to law and the regulations of the state Board of Education, may an extension of time to submit bids be validly granted at the request of some of the bidders by notice to such effect published once in a trade journal and as a news item in the newspaper which published the legal advertisement for bids?

2. In the event that no bids were forthcoming on the date indicated by the legal advertisement for bids as a result of such notice as indicated in the foregoing question, may the county school board accept the low bid received at the subsequent date to which the receiving of bids were purported to be extended?

To: *Honorable Harry P. Johnson, Attorney, Hendry County School Board, Clewiston, Florida:*

Sections 229.01, 229.07 (18) and (20), 229.17 (20) and 230.03, F.S., in general provide that public education is a responsibility of the state, that the state department of education and the superintendent of public instruction shall prescribe minimum standards and rules and regulations "to promote uniformity, accuracy, and completeness in executing contracts" and that such regulations shall be binding on the county boards of public instruction.

Pursuant to the authority vested in it by the above indicated statutes, the state board adopted March 21, 1950, a regulation relating to the advertising and contracting for buildings or improvements to school property. This regulation purported to make uniform the procedure for advertising and awarding contracts for building or improvements under the provisions of §235.31, F.S. It provides in pertinent part, that:

"1. When any contract is to be let for construction of a school building or other improvements to school property amounting to \$300, or more, the County Board shall publish as prescribed below a legal notice giving briefly the essential information relating to the project and including at least the following:

a. A statement that bids are to be filed in the office of the County Superintendent.

b. Date, time and place for opening of bids . . .

"2. This notice shall be published for three successive weeks in a weekly paper (or a week apart in a daily paper) . . ."

The attempt to give notice of an extension of time in which to submit bids by publication of such fact by a news item and in a trade journal is a clear failure of compliance with the state department regulations set forth above, especially the provisions of 1 (b) and 2 (notice shall be published for three successive weeks, etc.)

I have found nothing in the provisions of the school code or the provisions of Ch. 49 (relating to legal and official advertisements) which would excuse or mitigate the failure to comply with the directive of the state department of education as set forth above.

In view of the foregoing, I believe your questions must be answered in the negative.

December 7, 1951—051-449.

COUNTY SCHOOL BOARD—UNUSED PROPERTY— DISPOSAL—POWERS

STATEMENT and QUESTIONS: The Hendry county school system owns an 8-room building which was formerly used as the Felda school in a rural community. The building has not been used for several years because of consolidation of several schools. It is in a deteriorated condition and it would be impractical to repair it to be used for school purposes. Under these circumstances you present the following questions:

(1) Can the building be leased to an individual who would operate it as an apartment house?

(2) Can the school board rent rooms to individuals for living quarters in the building?

To: Honorable H. P. Johnson, School Board Attorney, Hendry County, Clewiston, Florida:

By virtue of §235.04, F.S., the county school board is given discretionary powers in the disposal of school property which is not needed or usable for school purposes. The board is charged with responsibility to "diligently attempt to do so on advantageous terms." I assume that the property in question is held by the county board in fee simple and that there is no reversionary interest in a third party which would prevent the board from using the property for other than school purposes.

It is my opinion that under the authority granted by §235.04, the board may either sell or lease school property, depending upon which method of disposal the board considers to be most advantageous to the county school system.

I believe, however, that it might be questionable from the standpoint of public policy for the board to rent rooms to individuals in the building in question. To do so, the board would, in effect, be going in to the hotel business, which is not consistent with its duties as a governmental agency in charge of county schools.

In my opinion the board could lawfully lease the building to an individual who would operate it as an apartment house as qualified above, but that the board might be subject to criticism if it operated the building as an hotel or apartment house itself as being contrary to public policy.

FINANCE AND TAXATION, SCHOOLS

February 28, 1951—051-40.

STATE EDUCATIONAL AGENCY—CUSTODIAN— FEDERAL GRANTS

STATEMENT: Public Law 815 passed by the 81st Congress provides for state school building surveys and state plans for school construction.

In order for Florida to participate in the funds for the surveys the application for funds must be accompanied by a written opinion by the State Attorney General citing appropriate sections stating that the agency designated in §§I & III, of the attached material, is the 'State educational agency' as defined in §210 (13) of the act: that the agency is authorized to carry out the purposes of Title I of the act; such educational agency is the sole state agency for carrying out the said purpose; the official designated in §§II & III of the application is duly authorized to receive the Federal grants under Title I of the act as official custodian thereof and that such custodian will disburse said funds under proper warrant of the State educational agency.

To: Honorable Thomas D. Bailey, State Superintendent, Department of Education:

In my opinion, based on §§242.51, 229.15, 229.18 and 229.19, F.S., the Florida State Department of Education is the proper agency as defined in §210 (13) of Public Law 815 of the 81st Congress to make application for funds as provided for surveys in the act, since the State Department is the administrative agency for the State Board of Education. I am also of the opinion, based on said sections of the Florida law, that the State Department of Education is the sole agency for carrying out said purpose.

It is therefore my opinion that the State Treasurer of the State of Florida under §236.19, F.S., is the duly authorized official to receive the Federal grants under Title I of the act in question and to disburse said funds upon proper requisition of the State Department of Education.

March 20, 1952—052-94.

BIENNIAL SCHOOL DISTRICT ELECTION—VOTERS— ELIGIBILITY

QUESTIONS: 1. If in a Biennial School District Election the voters in Special Tax School District #1 in a county fail to vote the minimum district millage as estimated by the school board to be necessary for the operation of the schools in that district for the regular term what would be the procedure in relation to the schools' operation for the period of time that the reduced millage would be in effect? Specifically, would the penalty provided in

§236.58 (5) be applicable in this case? If not, what procedure should be followed?

2. Can the School Board's millage estimate for Special Tax School District be placed on the ballot for approval by the freeholders at the Special Tax School District Election be broken down into more than one millage. For example: Six mills for supplies and equipment, etc., two mills for salaries, other mills for other things? (Exclusive of Building and Bus Reserve)

3. If the trustees approved a higher millage than the School Board's estimate as the amount of millage needed for ensuing two years, should the additional millage that the trustees recommended be placed as a separate item on the ballot or should it be added to the School Board's millage and written on the ballot as one millage?

4. In the light of §100.241 of the new 1951 Election Laws giving definition of a freeholder what specific qualifications must a person have to vote in a Biennial School District Election?

To: Honorable Thos. D. Bailey, Superintendent, State Department of Education:

Any decrease in the school term under 180 actual teaching days would have to be accomplished in accord with the provisions of §236.02 (2), F.S., and under the present law would have to be countywide.

Section 230.34 (1) was enacted by the 1947 Legislature (Section 12, Chapter 23726).

Section 236.58 (5) was enacted by the 1939 Legislature (Section 1058, Chapter 19355) and in so far as it is incompatible with §230.34 (1) has apparently been superseded by the later act. In other words, since January 1, 1948, as provided by §230.34 (1), all school districts in each county have been consolidated into one school district.

Since this is the case, there is now no way to apply the penalty provided in §236.58 (5) of limiting the number of days of school in a particular area of a county to conform to the amount of tax revenue voted by the voters of said area. The county now comprises one tax district and the millage is established by a countywide vote.

Section 236.02 (2), F.S., cited above, establishes the minimum term for all county schools except in cases of emergency, in which event the State Board may prescribe procedures for altering said term. This would apply, however, to all the schools in the county and not to a particular area in the county.

The provisions of §236.32 (2) (f), F.S., I believe, answer your question when considered in the light of the above observations. The only budgetary procedure which could be followed in the event that the voters failed to vote the minimum district millage estimated to be necessary for the operation of the schools would be for the county board to reduce its budget so that it could live within the revenue estimated to be available. Your question is answered in the negative and the procedure to be followed is as suggested above.

As to question 2, I believe that the form of ballot prescribed in §236.32 (2) should be followed as nearly as possible. Any substantial change in said form such as a breakdown of millages recom-

mended might well cause confusion on the part of the voters and I believe would be open to serious question as to its validity. This question is answered in the negative.

Question 3 is answered by §236.32 (2) (c), F.S.

As to your fourth question, your attention is called to §10, Art. XII, Florida Constitution, which is implemented by §236.32 (2) (d), F.S.

Section 100.241, F.S., defines freeholder requirements but is not applicable to school elections since the qualifications of voters in school elections are fixed by the above cited constitutional and statutory provisions.

Specifically, therefore, in response to your question, to be eligible to vote in a biennial school district election a person must have the qualifications set forth in §236.32 (2) (d) cited above.

FINANCE AND TAXATION; SCHOOLS

June 28, 1951—051-182.

ORANGE COUNTY SCHOOL BOARD—TEACHERS—INCREASE IN SALARY

STATEMENT and QUESTIONS: "The Orange County School Board desires to give each teacher \$150 cost of living across-the-board increase now to tide them over during the present summer months.

"They have submitted the three following proposals and wish to know if it would be legal for them to adopt any one of the three proposals. I would, therefore, appreciate your passing on the legality of the three proposals as stated below.

"No. 1. All teachers who have taught in Orange County Schools thirty (30) days or more during the 1950-51 year shall receive \$150 across the board after executing and returning a supplementary contract to the County Superintendent of Public Instruction.

"No. 2. All teachers signing a contract to teach in Orange County Public Schools for the year 1951-52 shall receive \$150 immediately upon executing and returning a supplementary contract to the County Superintendent of Public Instruction.

"No. 3. All teachers, new and old, shall be given the same type of supplementary contract with a proviso that an installment of \$150 be paid on the day they report for work and that the balance be distributed in ten (10) equal installments to be paid at the end of each calendar month of service."

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

In view of §11 Art. 16, of the State Constitution and §§236.02 (3) (a)-(d) and 230.23 (7) (g), F.S., I believe that all three of your questions must be answered in the negative, since all three plans would be at variance with one or more of the cited provisions of Florida law.

I believe that the plan set up in question one would violate the requirements of Art. 16, §11, of the Florida Constitution since it contemplates paying an additional compensation for work already performed during the past school year which ends on June 30 and which was not covered by contract. All three plans contemplate an immediate payment of \$150.00, which conflicts with the cited sections which require equal monthly payments on either a ten or twelve months basis and with the requirement that the payments be made at the close of each calendar month of service (see §236.02 (3), (a)-(d)).

Assuming, however, that the Orange County School Board has sufficient funds available and properly budgeted, I know of no reason why said Board could not give its teachers an increase in salary in an amount in keeping with its available funds, provided that said salary increase would be payable in equal monthly installments as required by the statute and provided that said salary increase was properly included in the teachers' contracts, even though said contracts were supplemental to the teachers' original contracts.

August 1, 1951—051-246.

ELECTIONS—BIENNIAL SCHOOL DISTRICTS— QUALIFICATIONS

QUESTION: What are the qualifications of electors to vote in the regular biennial school district elections provided for by §236.32 (2), F.S.?

To: *Mrs. Lucille M. Von Arx, Attorney, Board Public Instruction, Miami, Florida:*

Such elections are held for the purpose of electing school trustees and for the fixing of tax millage for the use of the public free schools within the district as contemplated by §236.32 (2). Find attached hereto opinion 045-247, dated August 18, 1945, issued by my predecessor in office dealing with the question here presented. I agree with the reasoning and conclusions set forth in such opinion.

Hence, as conditioned, and for the reasons set forth in such former opinion, it appears that §236.32 (2) (d), F. S., sets forth the qualifications of electors to participate in such elections, both for the purposes of electing school trustees and for fixing the district tax millage mentioned, as follows: "All qualified electors residing within any school district in the State of Florida whose voting registration is in that district, who pay a tax on real or personal property within the district, shall be entitled to vote in this election."

August 8, 1952—052-249.

COUNTY SCHOOL BOARD—MINIMUM FOUNDATION FUNDS—PURCHASE OF SCHOOL SITE—RACE TRACK FUNDS—USE

QUESTIONS: 1. May a county school board use minimum foundation funds for the purchase of a school site from the board of county commissioners?

2. May a board of county commissioners make a donation of race track funds to the county board of public instruction for the operation of the county schools?

To: Honorable Henry Melton, County Commissioner, Lake City, Florida:

State Board regulations, relating to the source and use of funds included in the foundation program for capital outlay and debt service adopted March 21, 1950, in accordance with the provisions of §§236.07 (6), 236.09 and 236.13, F.S., provides in pertinent part:

"3. Use of Capital Outlay and Debt Service Fund.

a. Capital Outlay and Debt Service Funds shall be used only for purchase and improvement of additional property for sites, . . ." (page 187, Regulations of the State Board of Education of Florida) (emphasis supplied.)

In view of the foregoing state board regulation promulgated pursuant to the statutory provisions of the School Code there would seem to be no objection to a county school board using minimum foundation program funds for the purchase of a school site.

The fact that the purchase of the school site was contemplated from the county commissioners of the county would not change the conclusion I have indicated. In fact, such a sale as you have indicated in your question is favored by statute.

This statute is §125.38, F.S., which in part, provides:

"If . . . the State of Florida or any political subdivision or agency thereof, or any municipality of this state, or corporation . . . not for profit which may be organized for the purpose of promoting community interest and welfare, should desire any real or personal property that may be owned by any county of this state or by its board of county commissioners, for public or community interest or welfare, then . . . such political subdivision, agency, municipality, corporation or organization may apply to the board of county commissioners for a conveyance or lease of such property. Such board, if satisfied that such property is required for such use and is not needed for county purposes, may thereupon convey or lease the same at private sale to the applicant for such price, whether nominal or otherwise, as such board may fix, regardless of the actual value of such property. The fact of such application being made, the purpose for which such property is to be used, and the price or rent therefor shall be set out in a resolution duly adopted by such board. In case of a lease, the term of such lease shall be recited in such resolution. No advertisement shall be required." (Emphasis supplied.)

It would seem from the foregoing language that a county school board is at the least an "agency" or "corporation . . . not for profit" within the meaning of §125.38, F.S., to which a board of county commissioners would be authorized to convey real or personal property not needed for county purposes for a nominal consideration. This I think answers your first question.

Sections 550.13 and 550.14, F.S., distributes the race track money among the several counties.

Section 550.14, F.S., provides, in pertinent part, that when race track moneys "have been transmitted to the county commissioners

... the county commissioners may determine whether such moneys, or any part thereof, shall be converted into the county school fund, or to some other lawfully authorized fund . . . (2) *The whole or any part of the moneys so remitted may, by resolution of the board of county commissioners . . . be paid over . . . for use by the board of public instruction of such county, to be used by such board of public instruction in the payment of teachers' salaries or in payment of cost of transportation of pupils in the public school system of such county; . . .*"

Certain special acts distribute Columbia County's share of racing funds. However, none of them appear in conflict with the provisions of the above quoted general statutes, inasmuch as such statutes provide that any part of such funds transmitted to the County Commissioners may be converted by the Commissioners into the County School Fund.

In view of the above law, I think it would be permissible for the county commissioners to convert such portion of the county race track funds as they receive and deem desirable for the maintenance and operation of the public schools as is provided by §550.14, F.S.

This I believe answers your second question.

August 27, 1951—051-285

SUPERVISORS OF REGISTRATION DUTIES—BIENNIAL SCHOOL DISTRICT ELECTION

QUESTION: What are the duties of a supervisor of registration in relation to the regular biennial school district election?

To: *Mrs. Pearl Yancy, Supervisor of Registration, Orange County, Orlando, Florida:*

The request for opinion inquires concerning a bill supposed to have been introduced in the last session of the legislature in regard to the above mentioned elections. It is here remarked that no bill was passed which changed the law existing prior to the 1951 session of the Florida legislature concerning these elections.

Section 236.32 (2) (d) provides that all qualified electors residing within any school district in the State of Florida whose voting registrations are in that district, who pay a tax on real or personal property within the district, shall be entitled to vote in such election.

Section 236.32 (2) (b) provides that a supervisor of registration of any county shall furnish, upon payment for such service, to the county board, on demand, a certified list of the qualified electors, as defined in the school code, residing in a school district.

It appears that the full duty of the supervisor of registration in relation to a regular biennial school district election is set forth in above mentioned §236.32 (2) (b).

October 24, 1951—051-377.

ELECTIONS—BIENNIAL SCHOOL DISTRICTS—ELECTORS AFFIDAVIT

QUESTION: In view of the provisions of §236.32 (2) (b), F. S., in the conduct of a regular biennial school district election,

is it proper that the supervisor of registration furnish a list of all "qualified voters taken from the general election books" for use of election boards at such election, the election boards requiring persons offering to vote at such election to execute an affidavit of the nature set forth below herein?

To: Mrs. Iris Partin Sigler, Supervisor of Registration, Osceola County, Kissimmee, Florida:

Section 236.32 (2) (d), F. S., provides in effect that all qualified electors residing within any school district in this state whose voting registration is in that district, "who pay a tax on real or personal property within the district," shall be entitled to vote in the regular biennial school district election in such district.

Section 236.32 (2) (b), F. S., provides in effect that the supervisor of registration shall furnish, upon payment for such service, to the school board, on demand, a certified list of the qualified electors, as defined in the school code, residing in a school district, for use at such election.

Chapter 26870, Laws of 1951, is a comprehensive revision and amendment of the registration and election laws of this state. By January 1, 1960, the counties of the state must have adopted the permanent registration system set forth in §§98.041-98.151, F. S., both inclusive, as revised and amended in Ch. 26870. Subject to the exceptions noted in the succeeding paragraph, until a county has adopted such permanent system, registrations therein are controlled by other provisions of Ch. 26870.

Permanent registration systems established in counties by population acts or acts applicable to a single county, and local laws applicable in individual counties pertaining to various phases of registrations and elections, are presently effective (see §§98.141, 98.381 and 104.44, F. S., in Ch. 26870). Whether any of such local or population acts have provisions pertaining to a school election of the kind here considered and contrary to the parts of the school code mentioned is not here determined. It is here assumed that registrations and elections in Osceola County are controlled by the general laws of Florida; and this opinion is conditioned on such assumption.

Section 236.32 (2) (b), mentioned above, is the only provision of law, either in the school code or Ch. 26870, concerning the manner of advising election boards of the names of registrants qualified to vote in a biennial school district election. Under any circumstances, such a list as is contemplated by that law should be procured by the school board for the use of election boards in the conduct of such election.

The wording in the request for opinion, quoted above, "qualified voters taken from the general election books," is not clear. This may be intended to mean all registered electors on the books; or it may be intended to mean all registered electors on the books qualified to vote at such election.

The form of affidavit referred to in the question is as follows:

"I do solemnly swear that I am a resident of Special Tax School District One of _____ County,

Florida, and that I have paid a tax on Real or Personal Property in Special Tax School District One of _____ County, aforesaid, for the year next preceding this election and that I am qualified to vote in the Special Election now being held this _____ day of _____, A. D., 19_____."

There follows the line for signature of the voter and the jurat, which indicates the affidavit is to be executed before a clerk or an inspector of an election board.

An election inspector may administer the oath of the members of an election board to perform their duties (§102.051). An inspector or clerk may administer the required oath to an elector so infirm or illiterate that he cannot write (§101.48); and may administer the oath where doubt exists that the signature of an applicant to vote on an identification slip is not the same as the signature on the registration records (§101.49). An inspector or clerk may administer the oath in connection with the affidavit of a challenged voter (§101.111). It may be that an inspector may administer oath in connection with affidavit of an elector in a bond election that he is a freeholder (§100.241, F. S., in Ch. 26870). There appears to be no provision of the general election and registration laws authorizing an election board inspector to administer the oath and execute the jurat in connection with the affidavit described in the preceding paragraph.

In view of the foregoing, in my opinion the above question is properly answered as follows:

(1) There should be procured from the supervisor of registration by the school board of Osceola County for use at the 1951 biennial school district election, the certified list of electors qualified to vote in said election, as contemplated by §236.32 (2) (b). A list prepared by the supervisor of registration of all registered voters, regardless of qualifications to vote at such election, is not in compliance with the provision of law mentioned.

(2) Grave doubt exists that an inspector or clerk of an election board has the authority to administer the oath in connection with the affidavit mentioned above. Granted that there has been procured from the supervisor of registration the certified list of electors qualified to vote in said election, the requirement that each elector execute the form of affidavit above described is not unreasonable, even though it may constitute a written statement of an elector as distinguished from a statement under oath.

(3) The rule announced above will also apply in counties having permanent systems under population or local acts and in counties having local laws affecting phases of registrations and elections, provided, that such population or other acts have no provisions contrary in effect to the general laws herein discussed.

November 16, 1951—051-413.

COUNTY—BOND ELECTION—CAPITAL OUTLAY AND DEBT SERVICE—MINIMUM FOUNDATION FUNDS

QUESTION: "A certain county is proposing a bond issue

of \$6,000,000 based on the needs as indicated in a survey made by the State Department of Education as required by law for participation in the capital outlay portion of the Minimum Foundation Program, and subject to a bond election. To supplement this bond issue the county is proposing a 2 mill district levy for the Building and Bus Reserve fund, subject to approval of electors in the November 6 Biennial District Election.

"If the above financial program is approved by vote of qualified electors can \$236.07 (6) be legally construed to permit Minimum Foundation Program funds for capital outlay to be used for debt service on bonds already outstanding on the assumption that all capital outlay needs have been met in advance by the proposed program without waiting until actual construction is completed?"

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

It would seem that if in the discretion of the state superintendent of public instruction all major capital outlay needs in the county had been met or would be met by the proposed program, that under the provisions of \$236.07 (6), F.S., minimum foundation funds for capital outlay could be used for debt service on the bonds already outstanding. Your question as presented is answered in the affirmative.

FINANCIAL ACCOUNTS AND EXPENDITURES

April 11, 1951—051-87.

STATE DEPARTMENT OF EDUCATION—COUNTY BUDGETS —AMENDMENT TO PURCHASE OF SCHOOL BUSES—LOANS

STATEMENT and QUESTION: A school board has passed a legal resolution for an amendment to their budget to purchase needed additional school buses and the State Board of Education approved on January 23, 1951, a loan under \$237.27 for this purpose. The County Budget Commission has refused to adopt the amendment.

In view of a previous opinion and one circuit court case as to the authority of county budget commissions in such cases, can the State Superintendent of Public Instruction legally approve the amendment in question without the sanction of the County Budget Commission?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

I assume you refer to a final decree in a bill for declaratory judgment issued by Circuit Judge Stanley Milledge of the 11th Judicial Circuit on August 15, 1950 (No. 134257-C).

This decree in effect concurred in an opinion of this office of August 17, 1950 (AGO No. 050-397) in which I stated that I did not think that the Duval County Budget Commission was authorized to reduce the Duval County school budget or to eliminate or reduce items in the county school budget.

In view of the position which I have previously taken in this matter and which I still believe to be correct and in view of the circuit court decree, I believe your present question must be answered in the affirmative.

October 2, 1951—051-341.

COUNTY SCHOOL BOARD—BUSES—CONTRACTORS—
EQUIPMENT AND SERVICES—BIDS

QUESTION: "Could a county school system in which buses are not county owned legally employ contractors to furnish equipment and all services by a system which would eliminate competitive bidding and instead use as a determinant for selection and remuneration a point system at so much per point based on criteria such as the following:

1. Certificate of physical fitness and basic salary of driver.
2. Capacity of bus and tonnage of chassis.
3. Type of surface of road traveled.
4. Age of bus and chassis.
5. Establishment of route by defining procedure in pick-ups, deadheading, re-run miles, etc.?"

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

It would appear that the acquisition of transportation services for a county school system through the above outlined method would circumvent the provisions of §237.02 (2).

The method used to determine the qualifications of a school bus driver are to a large extent discretionary with the county board. In hiring a bus driver, the board is engaging an individual to perform a personal service and such procedure does not involve the necessity for competitive bids.

The furnishing of equipment, however, would constitute a separate and distinct contract and is in no sense a contract for a personal service. It is a contract involving the furnishing of equipment which I believe would fall within the provisions of §237.02 (2) above cited. I know of no statutory authority which would permit a county school board to proceed under the method contemplated in your question without requiring competitive bids. Your question is therefore answered in the negative.

November 23, 1951—051-422.

COUNTY SCHOOL BOARD—SCHOOL PRINCIPAL—PETTY
CASH FUNDS—RESPONSIBILITY

QUESTION: Where the Board has provided a school principal with a small petty cash fund from which miscellaneous school maintenance and other incidental expenses are to be paid, and said fund, while in his possession, is stolen from school premises, is the principal responsible for the loss or does the loss fall upon the Board?

To: *Honorable Thomas G. Hall, Attorney, Board of Public Instruction, Nassau County, Fernandina, Florida:*

I find no applicable reference to this subject in the State Board of Education regulations.

I assume that you refer to a petty cash fund as provided by §237.04, F. S., in which event the sum involved would not exceed \$25.00.

Section 237.04, Florida Statutes, provides:

"Petty cash funds.—The county superintendent may be allowed not to exceed fifty dollars, and the principal of a school not to exceed twenty-five dollars as a petty cash fund from which to make needed expenditures for school purposes in emergencies. Each petty cash fund established shall be managed by and charged to a single designated person. The funds shall be kept separate from all other funds and itemized receipts shall be taken for each expenditure. A statement of expenditures shall be made from time to time and at the end of each year.

It would appear that under the provisions of §237.04, F.S., the principal is personally charged with the responsibility for safekeeping the funds in question.

I believe, however, that the county board would have discretionary power to ascertain whether or not the principal had been negligent in his handling of the funds which were stolen. If the board were convinced that the theft resulted from circumstances entirely beyond the control of the principal, it could by appropriate resolution, relieve the principal of personal responsibility for the loss. I have discussed this matter with Mr. Joe Henry, State Auditor's office, and he agrees that if the school board followed this policy, it would not exceed its authority.

RETIREMENT SYSTEM FOR SCHOOL TEACHERS

March 21, 1952—052-99.

TEACHERS'—DISABILITY RETIREMENT APPLICATION— FELONY CONVICTIONS—MEDICAL BOARD EXAMINATIONS

QUESTION: Is a member of the state teachers' retirement system, who has been convicted of a felony after application for disability retirement under §238.07 (10) (e), whose original application was not approved due to insufficient information and whose supplementary disability retirement application with the requested additional medical information furnished was not considered by the Medical Board due to his intervening conviction, entitled to retroactive disability benefits to the date of his initial application, a subsequent disability application having been approved?

To: *Honorable K. D. Farris, Executive Secretary, Teachers' Retirement System:*

Section 238.04, Florida Statutes, provides:

"Medical board.—The board of trustees shall employ a

medical board of three physicians, not eligible to participate in the retirement system.

"The medical board shall arrange for, and shall pass upon, all medical examinations required under the provisions of this chapter, shall investigate all essential health or medical statements, and certificates by or in behalf of a member in connection with his application for disability retirement, and shall report in writing to the board of trustees its conclusions and recommendations upon all the matters referred to it, and perform such other duties as may be required of them by the board of trustees."
(Underscoring ours)

Your letter recites the additional medical information requested of the applicant was not considered by the Medical Board though transmitted to the Board October 5, 1947, because an opinion of this office under date of October 14, 1947 (1947-8 Biennial Report, p. 330) seemed to disqualify one convicted of a felony from the benefits of the teachers' retirement system.

Such opinion was of course a conclusion of law and could not operate to discharge the mandatory duties of the medical board under §238.04, supra, to evaluate the medical facts presented to it provided by said act as follows: "... report in writing to the board of trustees its conclusions and recommendations..." This was true even though the Board felt that the applicant was not legally entitled to the benefits of the Act, on the strength of the opinion hereinbefore referred to.

In a subsequent opinion this office, after an exhaustive analysis of the authorities and the reason for the rule and the trend of social insurance of this type, came to the determination that the majority rule, if not the general rule, and the better rule, was that in the absence of statutory provision otherwise, the misconduct of one primarily entitled to receive a pension or retirement pay is not legal grounds for denying to that person his pension or retirement pay (see 40 Am. Jur. 985, §29; Annotation in 114 A.L.R. 353-357) (AGO 050-16).

An administrative decision or order may be vacated or set aside for an error of law (see 73 Corpus Juris Secundum 606). The question of whether a disability petitioner was legally entitled to his retirement benefits was not within the purview of the medical board. It was the duty of the Board to examine the medical statements submitted and determine whether or not the petitioner was medically disabled from practicing his vocation and hence presumptively entitled to the benefits of the act. And as an administrative board they were required to "report in writing... its conclusions and recommendations..."

The fact that they did not do so because of an erroneous legal theory should not preclude the petitioner from the provisions of the act retroactively, if from the medical records available to the Board the medical disability of the petitioner can be established as of the time the Board erroneously dismissed the petition without performing the duties required of it by §238.04.

In view of the above, I believe that it is the duty of the teachers' retirement board to consider such evidence of disability at

the time applicant contends, as may be produced by the applicant. I further believe it to be the duty of the Board to make a complete investigation of applicant's case and to obtain such evidence of applicant's disability or nondisability at the time claimed, as may be now available. On the basis of such evidence, it is the duty of the Board to consider the applicant's claim and if conclusive evidence is placed before the Board that the applicant was in reality disabled at the time claimed, the Board should approve the payment of all amounts which would have accrued to the applicant since the time of his original application for retirement benefits.

Your question is accordingly answered in the affirmative, subject to the above reservations.

May 14, 1951—051-111.

TEACHERS' RETIREMENT PLAN—AGE FIFTY— TWENTY-FIVE YEARS SERVICE

QUESTION: Under the provisions of §238.07 (2) (c), F. S., may a member of the Teachers Retirement System be retired with credit for less than twenty-five years of service provided he has reached age fifty?

To: *Honorable K. D. Farris, Executive Secretary, Teachers' Retirement System:*

Section 238.07 (2) (c), F. S., provides:

"To retire after twenty-five years of service upon the basis of a standard of service of twenty-five years provided the member has reached age fifty; provided, further, however, that a member electing to retire under the provisions of this subsection shall not be eligible to receive the benefits allowed by subsections (7) and (10) (e) of this section."

It seems clear that the Legislature intended to require at least twenty-five years of service for retirement under this plan.

Your question is therefore answered in the negative.

November 28, 1952—052-319.

SCHOOL TEACHERS—RETIREMENT CREDITS— RETROACTIVE LEAVES OF ABSENCE

QUESTION: Does §238.05 (3) (a), F.S., which provides retirement credit for a member of the Retirement System who has been granted a leave of absence provided he continues his regular contributions, allow the Board of Trustees to approve retirement credit on the basis of a retroactive leave of absence granted by a county board of public instruction?

To: *Honorable K. D. Farris, Executive Secretary, Teachers' Retirement System:*

Your letter and attached file containing extracts from the minutes of the Duval County Board of Public Instruction make the essential facts appear as follows. On July 8, 1946, the County Board of Public Instruction in regular session voted to abolish the

position of the employee to whom your question relates as of July 15, 1946. At a special meeting of the Board of Public Instruction of Duval County, August 31, 1948, the said employee whose office had been abolished some two years before was reinstated on a permanent basis to a different position in the Duval County School System. And at a special meeting of the Board of Public Instruction of Duval County on August 29, 1949, the Board of Public Instruction voted to grant a retroactive leave of absence to such employee for the period from July 1946 to June 1948.

Section 238.05 (3)(a), F.S., provides in pertinent part as follows:

"(3) Except as otherwise provided in §238.07 (8), membership of any person in the retirement system shall cease if he *shall* be continuously unemployed as a teacher for a period of more than two years; or if in any five-year period after he last became a member he *shall* render less than three years of service as a teacher; or upon the withdrawal by a member of his accumulated contributions as provided in §238.07 (12), or, upon retirement; or, upon death; provided, that the adjustments prescribed below are to be made for persons who enter military, naval, or other armed services of the nation during a period of war, *and for persons who are granted leaves of absence*. Any member of the retirement system who ceases to teach by reason of service in the military, naval or other armed services of the nation *or who is granted leave of absence, shall be permitted to elect to continue his membership in the teachers' retirement system and membership service shall be allowed for the period covered by service in the armed forces of the nation or by leave of absence under the following conditions:*

(a) *A person who has been granted leave of absence shall file with the board of trustees before his next contribution is due an application to continue his membership during the period covered by his leave of absence and if such application is filed, shall continue his contribution to the retirement system on the basis of his last previous annual salary as a teacher, and shall pay such contributions to the trustees of the retirement system in monthly, quarterly, semiannual or annual payments, in his discretion.*" (Emphasis supplied)

I have found no judicial decisions that clearly answer the question you have asked. It seems reasonable from the use of the word "shall" throughout the section cited above that subsection (a) is intended to provide a mandatory and uniform method for the continuation of a membership in the Retirement System while on leave of absence. See Thompson, Statutory Construction (1940), §§262 and 265. The use of the phrase "a person who has been granted leave of absence . . ." in the subsection is significant and I think decisive of your question.

It seemingly excludes by logical implication any intention to authorize a county board of public instruction to grant leaves of absence retroactively. Nor am I able to find any language in Ch.

238, F.S., which might be construed to authorize Board of Public Instruction to grant retroactive leaves of absence.

When the facts of this case as outlined in your letter are set against the provisions of §238.05 (3) (a), F.S., I think it is manifestly clear that your question must be answered in the negative.

June 7, 1952—052-196.

SCHOOL TEACHERS—LIFE CERTIFICATES—COMPULSORY RETIREMENT

QUESTION: Does the provision of §238.07 (1), F. S., requiring compulsory retirement of members of the teachers retirement system who are 70 years of age, apply to a teacher who holds a life graduate certificate which contains the statement that the authority to teach is good during the life of the holder?

To: *Honorable John D. Justice, County Judge, Sarasota County, Sarasota, Florida:*

A teacher's certificate as issued by the State Department of Education, whether it be limited to a certain period of time or runs an indeterminate time as in the case of "life certificates," is not an employment contract. It is merely evidence of the teacher's ability to teach. A teacher holding a "life certificate" has no vested right to be employed regardless of all other considerations, such as health or age.

Holding a "life certificate" could not be construed to be a guarantee of employment for the teacher. To so construe would prevent the legislature or the state and county school boards from prescribing other reasonable qualifications which a certificate holder must possess in order to qualify to teach in the public schools.

There appears to be no inconsistency between the provision of §238.07 requiring compulsory retirement of teachers at 70 years of age and the language used in a life certificate to the effect that the authority to teach is good during the life of the holder. This language pertains to the individual's qualifications as a teacher from the standpoint of professional and educational standards. It does not imply a right to teach regardless of all other considerations. Your question is therefore answered in the affirmative.

October 8, 1951—051-352.

RETIRED TEACHERS—EMERGENCY—REEMPLOYMENT—BENEFITS SUSPENDED—ADDITIONAL SERVICE CREDITS

QUESTION: May a teacher under age 70 who has been receiving a service retirement allowance under the provisions of §238.07 (2), F.S., be employed again by the public school system of Florida as a teacher and receive retirement credit for additional service?

To: *K. D. Farris, Executive Secretary, Teachers' Retirement System:*

Chapter 238, F.S., provides for the State retirement system for school teachers in Florida.

I find no provision in this act which would prohibit the reentering into active service of a teacher who had retired.

Since the statutes are silent upon this point, I am of the opinion that the state board of trustees of the retirement system should, through appropriate regulation, determine the question.

I am advised that during the war years retired teachers were permitted to teach when there were no other teachers available. During such period of return to active teaching retirement payments of the teacher in question were suspended. On July 27, 1948, the board of trustees decided that since an emergency situation no longer existed, this policy would be discontinued.

This action would indicate that it is not the policy of the board to allow teachers who had retired to suspend their retirement and return to a regular teaching job unless an emergency was determined to exist by the board which would justify such action.

It would appear reasonable that under ordinary circumstances the board would not allow teachers to periodically return and suspend their retirement at will. Such a policy could only create confusion in the retirement system without serving any apparent purpose.

If, however, the board determines that there is a shortage of teachers in the state or in any particular community which would create the necessity of calling upon retired teachers to suspend their retirement and start teaching again, I know of no legal reason why the board could not take such action, provided the teacher has not passed the legal age limit of 70 provided by law.

If as qualified above the board does by appropriate resolution permit the suspension of retirement benefits and the reemployment of retired teachers, I am of the opinion that during the period of reemployment the teacher should receive credit for additional service.

GENERAL PROVISIONS FOR INSTITUTIONS OF HIGHER LEARNING

April 15, 1952—052-126.

STATE VOCATIONAL BOARD—INSTITUTIONS OF HIGHER LEARNING—TRAINING TEACHERS— SCHOOLS—DESIGNATION

QUESTION: May the State Vocational Board legally designate an institution or institutions of higher learning other than the two institutions specifically named in §239.09, F.S., as the schools for the training of teachers of agricultural, trade, industrial and home economics subjects?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

Section 239.09, F.S., which was derived from Ch. 7376, Laws of 1917, provides:

"University of Florida and Florida State University designated for vocational training.—The state vocational

board shall designate the University of Florida, at Gainesville, and the Florida State University, at Tallahassee as the schools for the training of teachers of agricultural, trade, industrial and home economics subjects, the one for men and the other for women."

Your attention is also invited to §236.20, F.S., which was derived from Chapter 7376, Laws of 1917, as amended by Ch. 19355, Laws of 1939 providing:

"State accepts provisions of vocational education act.

—The State of Florida accepts the provisions of the act of congress approved February 23, 1917, entitled 'An Act to provide for the promotion of vocational education; to provide for cooperation with the States in the promotion of such education in agriculture and the trades and industries; to provide for cooperation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure' and any acts supplementary thereto or amendatory thereof. The good faith of the state is pledged to make available for the several purposes of said act funds sufficient at least to equal the sums allotted from time to time to this state from the appropriations made by said act and to meet all conditions necessary to entitle the state to the benefits of said act."

An examination of the Federal law (Smith-Hughes Act, §12, Public Law No. 347, 64th Congress, approved February 23, 1917, as later amended by the George-Barden Act of 1946, Public Law No. 586, 79th Congress), indicates that Congress intended that each state should designate the colleges which are to be used for the training of vocational teachers. This law has been interpreted by a book entitled "Administration of Vocational Education," published by the Federal Security Agency, Office of Education. Generally, according to the rules and constructions contained in this book, the determination and selection of schools for the training of vocational teachers is vested in the State Vocational Board and the Federal Commissioner of Education.

This authority to designate schools necessarily must be considered as ambulatory, so that it can be exercised to meet changing conditions and circumstances. While it is true that when the Florida Legislature first accepted the Smith-Hughes Act in 1917, it designated only the University of Florida and Florida State College for Women as the schools for vocational training of teachers, it must be recognized that such designation was undoubtedly made in the light of then existing schools and circumstances.

Such designation by §239.09, F.S., must be read in *pari materia* with §236.20, which accepted, in toto the provisions of the Federal Act, including the requirement of the Federal Act that the State Board designated or created thereunder shall have "all necessary power to cooperate, as herein provided, with the Federal Board for Vocational Education in the administration of the provisions of this Act" (§5, Public Law 347, 64th Congress). And since the prime purpose of the Federal laws, as expressed in the House Committee on Education Report on the George-Barden Act, is "to stimulate the extension of the program of vocational education in communities

that are not now adequately served with such programs, and to encourage the establishment of vocational education programs in areas not now served by such programs," (emphasis supplied) it would appear that if the State Board is not empowered to designate additional schools as the need arises, it would not have the "necessary powers" contemplated by the Federal law.

The fact that §236.20 has been re-enacted subsequent to 1917, with modifications accepting the Smith-Hughes Act "and any acts supplementary thereto or amendatory thereof" is further indication that the legislature intended to keep pace with new needs and changing conditions, and to empower the State Board to make additional designations as the circumstances might warrant. As a matter of fact, this authority has already been exercised in at least one instance by the designation by the State Board, with the approval of the Federal authorities, of the Florida Agricultural and Mechanical College as an institution authorized to participate in the program.

In considering this question, the doctrine of "expressio unius est exclusio alterius" has not been overlooked. However, this maxim is only applied as a means of discovering legislative intent, and should never be permitted to defeat the purpose of the Legislature, nor will it generally exclude the application of the statute to things of the same class as those expressly mentioned which have come into existence since the passage of the statute. 59 C.J. 985. In the instant case, it is my opinion that the application of the doctrine would serve to defeat the basic purpose of the Federal laws, as well as the intent of the Florida Legislature as indicated by its acceptance of all the provisions and purposes of those laws, as discussed above.

Accordingly, I do not believe that the designation made by the Legislature in 1917 should be considered as exclusive, and therefore as prohibiting the State Board from carrying out the ever-changing responsibilities imposed on it to administer the vocational education program in conformance with the clear intent and purposes of the Federal acts, as contemplated by §236.20, F.S., and thus to prevent such Board from designating other institutions as deemed necessary to meet modern requirements and revised needs.

It is therefore my opinion that the State Vocational Board may legally designate institutions of higher learning, in addition to those enumerated in §239.09, F.S., as schools for vocational training under §236.20, F.S., and may submit such designations to the Federal authorities for their concurrence. Whether or not such institutions will meet the requirements of the Smith-Hughes Act, as amended,—that is to say, whether such other institutions are so publicly controlled or otherwise organized to be eligible to train vocational teachers—is a matter for the Federal authorities to determine.

BOARD OF CONTROL

January 22, 1951—051-19.

MOTOR VEHICLES—LIABILITY INSURANCE—GOVERNMENTAL IMMUNITY

QUESTIONS: 1. Is it lawful, under Ch. 25147, Laws of 1949, §240.28, F.S., to pay the premiums on Hartford Accident & Indem-

nity Policy No. PY-15619, issued to your Board, covering motor boats used by Florida State University to carry students and faculty out to gather marine specimens and for lectures?

2. May we lawfully agree to an endorsement excepting from the provisions of the policy hazards arising out of diving by University students and members of the faculty or any other person?

3. Is the endorsement attached to said policy, in regard to waiver of governmental immunity, in satisfactory form?

To: Board of Control:

1. Chapter 25147, Laws of 1949, now appearing as §240.28, F.S., authorizes the Board of Control, in its discretion, to provide insurance to cover bodily injury or death, and property damage, or both, arising from the ownership, maintenance, operation or use of any "motor vehicles of the Board of Control or any of the institutions under its management, control or supervision, and to pay premiums therefor." It is not unlikely that the Legislature may have intended only to cover automobiles, trucks and buses, but the language used, that is, "motor vehicles," is broad enough to include a motor boat used for transportation of students and faculty members while attending their scholastic duties; and, while the question is not completely free of doubt, I think that if the Board sees fit to do so it may lawfully purchase and pay the premium for a reasonable amount of insurance for personal injury and property damage coverage in connection with the operation, use or ownership of the boats.

2. The diving itself might lawfully be eliminated from the coverage of the policy but, if the diving is accompanied by careless or negligent handling, use or operation of the boat, which contributes to the injury, there is no reason why it should be excluded. I think an endorsement might be worded substantially as follows:

"It is agreed that such insurance as is afforded by this policy does not apply to hazards arising out of diving by Florida State University students, members of the Faculty or any other Person or Persons unless the injury suffered in the course of such diving may have been due in whole or in part to defects in the boat or equipment or to careless and negligent use, handling or operation of such boat or equipment."

3. The endorsement, which purports to prohibit the defense of governmental immunity, reads as follows:

"It is agreed, in respect to any claim otherwise covered by the policy, that the Company will not, when so requested by the Insured in writing, maintain that the Insured is immune from liability therefor by reason of having been engaged in a governmental eleemosynary or other function, as the case may be, exempting it from liability as a matter of law."

The provision is incorrect and unsatisfactory in the following respects:

Chapter 25147, referred to above, provides that the Insurer

shall not be entitled to the benefit of the defense of governmental immunity of the Board of Control in any suit brought against the Insured. The chapter is a part of the policy, the same as if written into the policy. The statute does not require the Board to request the Insurer in writing or otherwise to forego the defense of governmental immunity, and reference to such request should be eliminated except as hereinafter set out. The effect of the statute is to prohibit the defense of governmental immunity only to the amount of coverage provided by the policy; in fact, the State would require that governmental immunity be affirmatively pleaded in any suit as to any excess over the amount of the policy coverage. An appropriate endorsement might read as follows:

"It is agreed, in respect to any claim covered by the policy, that the Company will not assert or maintain that the Insured is immune from liability therefor by reason of being an agency of the State of Florida, except that when so requested by the Insured in writing, the Company will plead and maintain the Insured's governmental immunity from liability as to any amount in excess of the coverage provided by the policy."

March 10, 1952—052-73.

FLORIDA STATE UNIVERSITY—CAMPUS— TRAFFIC REGULATIONS

QUESTION: May the Board of Control adopt regulations for the handling of traffic on the campus of Florida State University?

To: Board of Control:

Your Board has authority to adopt reasonable regulations for the handling of traffic and similar problems on the grounds of the institutions of higher learning to the same extent as you may adopt regulations governing other matters at the institutions. In general, the submitted regulations appear to be reasonable and lawful except that under one name or another some of the regulations propose to impose certain fines. To the extent that any such imposition of money penalties may be by way of punishment, they are unlawful, as your Board has no authority to enforce fines. It may be that you can collect fines by voluntary cooperation of each student, and that you could install a system like the one which I understand is presently in operation at the University of Florida. Infraction of your lawful regulations by students, faculty, and employees may be punished by other disciplinary measures. As to persons not within those groups, only the courts can punish for violations of valid laws or ordinances in so far as such laws or ordinances may extend to the grounds of the institutions under your control.

March 11, 1952—052-75.

INSTITUTIONS OF HIGHER LEARNING—EMPLOYEES— GROUP LIFE INSURANCE

QUESTION: May the Board of Control legally enter into a contract with a life insurance company for group life insurance for employees at one of its institutions of higher learning wherein the Board agrees to pay a certain part of the premium cost by way of

an across-the-board or cost-of-living wage or salary increase as the employer's contribution to the premium?

To: Board of Control:

Section 112.08, F.S., authorizes State and other named public agencies to provide insurance for employees on a group insurance plan and to enter into agreements with insurance companies to that end. Section 112.09 sets up the procedure. Section 112.10 authorizes the employer (State or other public agency) "to deduct from the wages of such employee periodically the amount of the premium which such employee has agreed to pay for such insurance and to pay or remit the same directly to the insurance company." Section 112.11, requires participation to be voluntary at all times.

Group insurance for public employees must be written in accordance with the statutes, and not otherwise. No provision is made for employer contribution. The proposed payment of part of the premium by cost-of-living or across-the-board increase in wages, as the employer's contribution, does not appear to come within the provisions of the statutes and therefore, would not be lawful.

March 12, 1952—052-79.

UNIVERSITY OF FLORIDA EMPLOYEES—CAMPUS CREDIT UNION—SALARY CHECKS—ASSIGNMENT

QUESTIONS: 1. May the University of Florida Payroll Department, upon written authorization from the employee, deliver salary checks of the employee to a Campus Credit Union?

2. If so, what authority must the Credit Union have to endorse the checks to enable them to apply a part or all of the proceeds of the check to the outstanding loan?

3. What should be included in the loan application form used by the Credit Union to fully authorize the transfer of the check by the University to the Credit Union?

4. May the employee assign his retirement allowance upon separation from the University? And, if so, what is necessary to enable the Credit Union to obtain the funds represented by the check in order to apply same on the employee's loan?

To: Board of Control:

There is established on the campus of the University of Florida the Gainesville Florida Campus Federal Credit Union, organized in 1935 under the Federal Statute, 12 U. S. C. A., §1752. Membership is limited to employees of the University located in Gainesville and environs and the immediate members of their families and any association of such employees.

1. It is lawful for the University to deliver employees' salary or wage checks to the Credit Union upon proper authorization by the employee.

2. Endorsement of the salary or wage warrant by the Credit Union might be provided for by powers of attorney authorizing the endorsement, etc., but that procedure would be impracticable at best. Borrowing against public wage or salary warrants is not un-

common, and the method of handling such transactions has been in use for a long time and, I believe, has proved satisfactory. Applying that method to your problem, the procedure would be as follows: A copy of the borrower's note is delivered to the Payroll Department. Upon receipt of the employee's wage or salary warrant, the Payroll Department delivers the same to the Credit Union. The employee then goes to the Credit Union, endorses the warrant, and receives from the Credit Union whatever amount, if any, may be in excess of the sum he agreed to pay from that warrant.

3. In reply to your third question, it is my opinion that the above procedure would not require a change in the application loan form which you submitted. However, there should be added to the last paragraph of the note the following: "The obligation of the University of Florida, after receipt of notice of the said assignment, will be fully satisfied as to all parties to this transaction, their heirs, executors, administrators, successors, and assigns, by delivery to said Credit Union of the salary or wage checks or warrants, made payable to the employee whose wages or salary is herein pledged, assigned or transferred.

Copy of the note served on the proper University authorities will suffice for notice.

4. The pensions, annuities and other benefits accruing under the State Officers and Employees Retirement Act may not be assigned. See §121.13. Similarly, §238.17 prohibits the assignment of Teacher Retirement System pensions, annuities, etc.

June 18, 1951—051-165.

UNIVERSITY OF FLORIDA—PENALTIES IMPOSED BY STUDENT TRAFFIC COURT

STATEMENT: This is in response to your verbal request for advice as to the operation of the Student Traffic Court at the University of Florida and the extent to which it may lawfully function. You have submitted printed copies of "Regulations Governing All Vehicular Violations by Students, Faculty, and Staff" and of Student Traffic Court Regulations as revised by the Executive Council on December 5, 1950.

To: Board of Control:

It is my opinion that the Board of Control may lawfully approve the "Regulations Governing All Vehicular Violations by Students, Faculty and Staff" on the campus of the University, and may also approve the Student Traffic Court which has been set up at the University of Florida to hear and determine all cases of traffic and parking violations, and may approve the punishment provided for such violations in the Student Traffic Court Regulations adopted by the Student Executive Council, including the right to appeal to the faculty disciplinary committee as set up in those Student Traffic Court regulations.

The Regulations were adopted with the approval of all persons concerned, including the representatives of the student body, and appear to be reasonable in all respects. The payment of the limited monetary punishment imposed by the Student Traffic Court for

offenses within the restricted jurisdiction of that court, may properly be accepted in lieu of other disciplinary action by the University or Board of Control for the offense committed, if the Board sees fit to do so. In so far as the punishment imposed by the Student Traffic Court is non-statutory, and is actually on a voluntary basis, and may not be enforced by the Student Traffic Court or its officers by jail sentence or use of force, the University and the Board of Control necessarily retain in all cases the right and duty to take appropriate disciplinary action against the offender, where he refuses to satisfy the penalties imposed by the Student Traffic Court, just as it would in case of violation of any other University or Board regulation.

You understand, of course, that neither the Board of Control nor the University has authority to waive punishment for any act which is made a crime by statute or common law, or prosecution for any criminal offense in a proper court.

July 6, 1951—051-201.

STATE PLANT BOARD—INSPECTORS—FEDERAL FUNDS DUAL EMPLOYMENT

QUESTION: Are inspectors of the State Plant Board whose salaries are paid from State funds and who are assigned to the enforcement of Federal foreign plant quarantines at ports of entry in Florida eligible under the laws of this State to participate in the overtime payments provided for in Public Law 735, 81st Congress, approved August 28, 1950?

To: Board of Control, Tallahassee, Florida:

These inspectors are appointed agents by the Bureau of Entomology and Plant Quarantine, United States Department of Agriculture, and, as such, are authorized to enforce Federal plant quarantines. The Federal Bureau has insufficient personnel to carry out proper inspection at the critical ports of entry and it is for that reason that Plant Board inspectors are authorized to assist in the enforcement of Federal plant quarantines. These agents receive from the Federal Government from \$180 to \$240 annually. One, the highest paid, receives \$300 annually.

Public Law 735, referred to, authorizes a certain per hour overtime payment to inspectors who are called into service on holidays and during times when they are off duty.

I find no constitutional or statutory provision which would prohibit the State Plant Board inspectors from receiving or accepting the overtime payments from the Federal Government. The inspectors are employees, not officers, and their assistance in enforcing the Federal plant quarantines is not only compatible with their State employment but is supplemental and basically related thereto.

July 12, 1951—051-209.

BOARD OF CONTROL—BIDS—BIDDER'S DEFAULT— DEPOSIT RETAINED AS LIQUIDATED DAMAGES

QUESTION: In its invitation for bids for certain construction, the Board of Control agreed to refund to all general con-

tractors submitting bids the price which they paid for drawings and specifications, in consideration of the bidder agreeing that he would not revoke or cancel his bid or withdraw from the competition for a period of fifteen days after the opening of the bids. The price of the drawings and specifications was \$10.00 per set and each bidder was allowed to purchase only two sets. The Board further required that the bids be submitted under seal. The form of the bid, which was under seal, contained this agreement:

"In consideration of the agreement by the Board of Control to refund the cost of each set of plans purchased by the bidder upon their return to the Board's architect, the other valuable consideration, receipt whereof is hereby acknowledged, the bidder has agreed and does hereby agree that the above proposal shall remain in full force and effect for a period of fifteen days after the time of the opening of this proposal, and that the bidder will not revoke or cancel this proposal or withdraw from the competition within said fifteen-day period . . . and that in the event of bidder's default or breach of any of said agreements, said bid deposit shall be forfeited to the Board of Control as liquidated damages." Each bidder was required to make the customary bid deposit, which in this case was \$500.00. After opening of the bids, the lowest bidder stated it had made a mistake and could not carry out its proposal, cancelled its bid and withdrew from the competition. May the Board of Control retain the bidder's deposit?

To: Board of Control:

In an opinion to your Board on February 1, 1949, 049-39, I explained that a bid can be withdrawn at any time before its acceptance, even though it provides that it may not be withdrawn or fixes the time for its acceptance, unless made upon a sufficient consideration or under seal. However, your present question presents a very different situation.

It will be observed that not only was the bid under seal but the Board of Control obligated itself to refund to every contractor who entered the competition, however numerous they might be, the total cost of the drawings and specifications which they purchased, in consideration of the contractor agreeing to maintain his proposal for fifteen days after the bids were opened. Where the agreement to maintain a bid for a certain number of days is based upon a consideration, the agreement is binding. Also, by the weight of authority, if the bid is made under seal, it presumes a consideration and is binding. 13 C. J. 294-5; 17 C. J. S. 397; 12 Am. Jur. 528-9.

I think it may be stated more clearly in a different way. Not only was the Board's invitation a call for bids, but it also contained an offer to refund certain expenses that the bidders would incur. In the bidder's proposal, he accepted that offer, thereby completing a contract between himself and the Board. Thus, regardless of the outcome of the bidding, there was a separate, complete, and binding contract between the Board and each of the bidders which required the Board to refund the cost of drawings and specifica-

tions incurred by each bidder and required the bidder to maintain his bid for the limited time.

In accordance with the terms of the bidder's acceptance of the Board's offer in that respect, the Board may retain the deposit, as liquidated damages.

SALARIES; MISCELLANEOUS EDUCATIONAL LAWS; APPROPRIATIONS

June 5, 1952—052-176.

COUNTY SUPERINTENDENTS OF PUBLIC INSTRUCTION—COMPENSATION

QUESTIONS: 1. In §242.011 (2) (a), F. S., do the words "the highest maximum annual salary established by law to be paid to the other highest paid county official in the county" include the total of the county judge:

(a) Under §145.01, F. S., or under acts of local application that provide different amounts for the same services;

(b) The maximum established by §39.18 (2) as judge of the juvenile court, or under acts of local application that provide different amounts for the same services;

(c) Under Ch. 23642, Laws of 1947 (in four counties at present)?

2. As of what date in each school fiscal year does "the highest maximum annual salary established by law to be paid to the other highest paid county official in his county" determine the maximum salary that may be paid a county school superintendent?

To: Honorable Bryan Willis, State Auditor:

Section 242.011, F. S., in general provides the basis for the compensation of county superintendents of counties of less than 200,000 population. And subsection (2) (a) thereafter provides:

"No county superintendent of public instruction shall receive for his annual salary a sum in excess of the highest maximum annual salary established by law to be paid to the other highest paid county official in his county."

Section 145.01, F. S., limits the compensation of certain county officials to \$7,500.00 per year.

An opinion of this office, see opinion of the Attorney General No. 045-253, dated August 21, 1945, held that a county judge is a county officer and not a state officer. That opinion also held that "... no part of that salary may be lawfully retained by him if it would make his total compensation for all services, both as county judge and as judge of the county court, exceed \$7,500.00."

This limitation has in certain cases been expressly modified by acts of local application that provide additional sums of salary be retained by the county judge.

Thus Ch. 23642, Laws of 1947, provides that in addition to the

compensation to which he is entitled under §145.01, F. S., each county judge of a county having a population of more than ninety thousand and not more than one hundred and fifty thousand inhabitants shall be paid by such county an additional sum of \$1000.00 per year under certain conditions.

And Ch. 26670, Laws of 1951, provides that in addition to the compensation to which he is entitled under §145.01, F. S., each county judge of a county having a population of more than one hundred fifty thousand and not more than two hundred and forty thousand inhabitants shall be paid by any such county an additional sum of \$1500.00 per year, under certain conditions.

An opinion of the Attorney General, No. 051-32, dated February 16, 1951, held that a local act that provided compensation paid to a county judge as ex-officio judge of the juvenile court should be exempt from the provisions of §145.01 clearly "... relieves the County Judge of Escambia County from the duty of reporting his compensation as Juvenile Court Judge ... pursuant to the requirements of Sections 145.01 to 145.05, Florida Statutes, 1949." See also AGO No. 051-350, dated October 5, 1951.

Chapter 26880, Laws of 1951, (Ch. 39, F. S.) commonly known as the Juvenile Court Act, provides a mandatory and uniform method of adjudicating juvenile cases throughout the state. See AGO No. 051-230, dated July 20, 1951.

This chapter in effect repealed all special acts relating to juvenile courts except those specifically enumerated in Section 3 of the bill. Those "provisions" of special acts that were expressly not repealed include those which fix the salary of the judge. See AGO No. 051-181, dated June 22, 1951.

Section 39.18 (2), F. S., the same being part of Ch. 26880, Laws of 1951, provides a sliding scale of compensation for the judge of the juvenile court. See AGO No. 051-194, dated July 3, 1951.

And §39.18 (5), F. S., the same being also part of Ch. 26880, Laws of 1951, expressly provides:

"In counties where the county judge is juvenile court judge, the salary of the juvenile court judge may be paid to the judge in addition to compensation received in the capacity of county judge." (emphasis supplied)

Section 39.18 (7), F. S., the same being also part of Ch. 26880, Laws of 1951, provides in pertinent part:

"... and no county judge acting as juvenile court judge shall be paid, as salary for services as juvenile court judge, an annual sum which, together with the compensation of that county judge for services as county judge, will exceed the annual salary paid to the circuit judge drawing the largest annual salary in the judicial circuit in which that county is acting as juvenile court judge. For the purpose of this subsection, the circuit judge's salary includes any sums paid as salary by any county or by the state." (emphasis supplied)

In view of §39.18, (5) and (7), F. S., quoted above, it is my opinion that the general compensation limitation to \$7500.00 of certain county officials by §145.01, F. S., has been modified in the case of county judges who are also judges of the juvenile court. To that extent the former opinion of this office, No. 045-253, dated August 21, 1945, has been modified by §39.18, F. S.

In general, when one statute treats a subject in general terms and another treats a part of the same subject matter in a more minute manner, the two statutes should be read together and harmonized if possible. However, in the event of repugnancy, the special statute should prevail, since the specific statute more clearly evidences the legislative intent. See Crawford, Statutory Construction (1940), §230.

In the light of the foregoing applicable law, it is my opinion that your first question is best answered as follows:

The words "the highest maximum annual salary established by law to be paid to the other highest county official in the county would include the salary of the county judge. See opinion of my office, No. 051-266, dated August 9, 1951.

The limitation of the salary of the county school superintendent provided in §242.011 (2) (a), F. S., would be governed, assuming the county judge was the highest paid county official, by the total salary paid to the county judge under the applicable law.

If special or local laws were applicable to the salary of the county judge in counties of less than 200,000 population, then of course the salary paid the county judge under such applicable provisions would control and limit the total salary that could be paid county superintendent under the provisions of §242.01, F. S.

If there were no local or special laws applicable in such counties, then the compensation paid pursuant to §39.18 (2), (5) and (7), where applicable (and controlling), and §145.01, F. S., as the provisions of the general law would determine the maximum salary payable to the county superintendent.

As regards your second question, §242.011 (1) provides in pertinent part:

"... the annual salary of the superintendent of public instruction ... shall be *fixed and paid*, according to the total number of instruction units within the county *during the immediately preceding fiscal year* . . ." (emphasis supplied)

The language of §242.011 (2) (a) is, of course, a limitation on the compensation payable under §242.011 (1). The allowable compensation is fixed on the basis of conditions prevailing as of the immediately preceding school fiscal year.

Section 116.03, F. S., provides in general that each state and county official who receives all or any part of his compensation in "... fees or commissions, or other remuneration ..." shall annually on the 31st day of December of each and every year

make a report thereof to the Comptroller. I think that the compensation paid to a county judge as judge of the juvenile court, must be included in that report. See AGO No. 051-32, dated February 16, 1951.

In my opinion, the report of the county judge, when appropriate, to the Comptroller immediately preceding the date of the school fiscal year would be the proper date for determining the maximum salary that may be paid to a county school superintendent.

June 5, 1952—052-177.

HIGH SCHOOL BOYS—SECRET ORDER

QUESTION: Do §§242.46, 242.47 and 242.48, F. S., prohibit the establishment of a secret order sponsored by the Odd Fellows Lodge of Orlando, the membership of such proposed organization to be composed of high school boys?

To: *Honorable Murray W. Overstreet, State Attorney, Kissimmee, Florida:*

I assume from the information given in your letter that the junior order of Odd Fellows would not operate within the schools. Its membership, however, would be composed partially or wholly of high school students. It would seem, therefore, that the provisions of §242.46, F. S., would not be applicable since it is concerned with organizations within the schools.

Section 242.47, F. S., would apply. You will note that this section authorizes county school boards to approve organizations whose membership is selected "on the basis of good character, good scholarship, leadership ability and achievement."

In my opinion the legislature did not intend to prohibit high school students from joining organizations which are sponsored by adult organizations of long standing and recognized value to the community such as the Odd Fellows, Masons, Knights of Columbus, Knights of Pythias, Elks, and other organizations of similar character and standing.

This opinion is strengthened by the language of the Florida Supreme Court in case of *Satan Fraternity v. Board of Public Instruction for Dade County*, 156 Fla. 222, 22 So. 2d 892. In that case the Court said:

"It is at least far fetched to contend that high school fraternities and sororities are on a parity with religious organizations and fraternal societies such as the Masons, Elks, Odd Fellows and others. The church and the Masons are much older than the State and fostered education long before the State did and have never been charged with acts inimical to it."

In my opinion, the county school board must consider each organization separately and on its own merits. If in the discretion of the school board the junior order of Odd Fellows or any other similar organization complies with the provisions of §242.47, I know of no reason why the board could not approve the establishment of the organization.

Subject to the above observations, your question is answered in the negative.

August 30, 1951—051-291.

SCHOOL BOARD MEMBERS—COMPENSATION

QUESTIONS: 1. Under Ch. 26396, Laws of 1949, the chairman of the board of public instruction for Santa Rosa County shall receive compensation in the amount of \$100.00 per month, and the other members of said board shall receive \$50.00 per month. From what period of time would the chairman be entitled to receive \$100.00 per month compensation? He has been receiving \$50.00 per month under the provisions of Ch. 26395.

2. Ch. 26396 by its own terms expires on October 1, 1951. Is there any other population act under the terms of which the members of the board of public instruction of Santa Rosa County may be compensated? I do not have available a list of 1951 population acts that might contain this information.

To: Honorable Woodrow M. Melvin, Attorney, Board of Public Instruction, Santa Rosa County, Milton, Florida:

Santa Rosa County has a population of 18,554 according to the 1950 federal census which became the official state census on April 1, 1950.

Chapter 26396, Laws of 1949, applied to counties having a population of not more than 19,225 and not less than 17,700. This act which applies to Santa Rosa County fixed the compensation of members of the school board at \$50.00 per month and the compensation of the chairman of said board at \$100.00 per month.

The effective date of this act was October 1, 1949, but Santa Rosa County did not grow into the population bracket provided by this act until April 1, 1950, since its population prior to that date was established at 16,986.

In answer to your first question, therefore, the chairman of the board of public instruction would be entitled to compensation at \$100.00 per month as provided by Ch. 26396 from April 1, 1950, until October 1, 1951, at which time the act ceases to be effective as provided in the act itself.

With regard to question two, it appears that subsequent to October 1, 1951, Santa Rosa County will not fall within the provisions of any existing population act, since Ch. 26396, Laws of 1949, becomes inoperative on October 1, 1951, and since the present population of Santa Rosa County does not fall within the population brackets established by any other legislative act applying to the compensation of school board members. It would appear, therefore, that §242.03, F.S., would govern the compensation of school board members of Santa Rosa County after October 1, 1951.

September 4, 1951—051-300.

COUNTY SUPERINTENDENTS PUBLIC INSTRUCTION— COMPENSATION

QUESTION: In the light of previous opinion 051-114 ren-

dered May 15, 1951, does Ch. 26795, Laws of 1951, now supersede Ch. 25609, Laws of 1949, particularly in view of the wording in §1 of Ch. 25609 which says in part: "... shall be an amount equal to the maximum annual compensation now or hereafter allowable by law ..."?

To: *Honorable Thomas D. Bailey, Superintendent, State Department of Education:*

Chapter 26795, Laws of 1951, (§242.011, F. S.) fixes the annual salary of county superintendents of public instruction in counties whose population is less than 200,000 according to the last official census.

Chapter 25609, Laws of 1949, fixed the salary of county school superintendents in counties having a population of more than 17,850 but less than 19,200 according to the preceding state census.

It appears that all of the counties contemplated by the population bracket established in Ch. 25609, Laws of 1949, would now fall within the provisions of Ch. 26795, Laws of 1951, (§242.011, F. S.) which applies to all counties of less than 200,000 population (in the absence of special legislation to the contrary).

The provision contained in §1 of Ch. 25609, Laws of 1949, "... now or hereafter allowable by law ..." was repealed by Ch. 26795, Laws of 1951, along with the other provisions of Ch. 25609, Laws of 1949, in so far as they were in conflict with the subsequent act (Ch. 26795, Laws of 1951). Your question is therefore answered in the affirmative.

CHAPTER XVI
MILITARY CODE AND RELATED MATTERS

NO OPINIONS

CHAPTER XVII

PUBLIC LANDS AND PROPERTY

PUBLIC PROPERTY AND PUBLIC BUILDINGS

July 23, 1951—051-235.

PUBLIC SCHOOL PROPERTY—MUNICIPAL SPECIAL ASSESSMENTS

QUESTION: Is property acquired and used for public school purposes within the corporate limits of the Town of Callahan, Nassau County, subject to special assessments imposed by said town for the paving of a street upon which such property abuts?

To: Honorable Thomas G. Hall, Attorney, Board of County Commissioners, Nassau County, Fernandina, Florida:

The case of Blake, et al vs. City of Tampa, 115 Fla. 348, 156 So. 97, determined that the legislature may by special act empower and direct expenditure of school funds for paying special assessments for street improvements lawfully imposed, when not in excess of the benefits received. That lacking special legislation, the trustees of a special tax school district, are powerless to expend school funds so long as the property is used for school purposes.

Our attention has not been directed to any special legislation on the subject, and we assume there is none. If there were, there is still the question which we do not decide, as to whether or not a special act might now supersede the general law.

The answer, as qualified, is in the negative.

STATE AND UNITED STATES FLAGS

March 8, 1951—051-47.

STATE OF FLORIDA—GREAT SEAL—REPLICAS

QUESTION: A certain Shrine Club in Florida desires to have manufactured replicas of the Great Seal of the State for sale to the public, profits of such sales to be contributed to the Crippled Children's hospital maintained by Shriners in this state. Lawfully may replicas of the Great Seal of the State be manufactured and sold under the circumstances mentioned?

To: Honorable R. A. Gray, Secretary of State:

An examination of our statutes (including Ch. 256, F. S.) and the state constitution fail to evidence any legal impediment to the manufacture and sale of replicas of the Great Seal of the State of Florida as contemplated by the question.

The provisions of Ch. 256 relating to the flag of the State and the United States and to any "flag, standard, color, ensign,

or shield" of the United States or this State, contain no prohibition against such manufacture and sale.

Hence, the question is answered in the affirmative.

STATE LIBRARY

February 19, 1952—052-46.

STATE LIBRARY BOARD—APPOINTMENT OF SECRETARY AS STATE LIBRARIAN—QUALIFICATIONS

QUESTION: Is it within the authority and sound discretion of the State Library Board to determine the qualifications of its secretary, and to employ such a person, who shall also serve as State Librarian?

To: *Honorable W. Hudson Rogers, Chairman, State Library Board, State Library:*

Section 257.03, F. S., provides that the State Library Board shall appoint a secretary who is not a member of the Board, to serve at the will of the Board and for such compensation as shall seem adequate. Said section further provides that the secretary shall act as librarian of the state library and shall be a person trained in modern library methods.

It is my opinion that your question should be answered in the affirmative.

PUBLIC LANDS

May 17, 1951—051-119.

TRUSTEES INTERNAL IMPROVEMENT FUND—TAXATION OF LANDS SOLD BY

QUESTIONS: 1. Where public lands are sold by the trustees of the internal improvement fund of this state, to be paid for by installments, and the said sale is evidenced by a written contract of sale, are the said lands, or any right, title or interest therein, subject to ad valorem taxes?

2. Where such lands are placed on the tax roll of a county, taxes are extended, and tax sale certificates are issued, for failure to pay the taxes assessed, to the county or to individuals, what disposition should be made of the said tax sale certificates?

To: *Trustees of the Internal Improvement Fund:*

We feel that such sales are authorized under the statutes of the state (§§270.09, 270.11, 270.16, 270.17, and other sections, F. S.). Under these contracts of sale the legal title is vested in the state and an equitable title in the purchaser. Under such a contract the legal title remains in the vendor, in the nature of security for the payment of the remaining or unpaid part of the purchase price (55 Am. Jur. 781, §355) while an equitable interest or title vests in the vendee to the extent of the payments made by him, and as his payments increase his equitable interest increases (55 Am. Jur. 783, §356). It has been stated that as a vendee makes payments on a land contract the vendor becomes trustee for him of

the legal estate, and he becomes in equity the owner of the land to the extent of the payments made (*Larson v. Metcalf*, 201 Iowa, 1208, 207 N. W. 382).

In determining the meaning and effect of a contract to which the government is a party usual rules of construction would seem to be applicable. Turning to the contract we find nothing in it which differentiates it from the normal executory contract for the sale of lands with partial payments. We feel that the contract in question transferred to the purchaser an equitable title in and to the lands therein described. The state retained legal title as security (*S.R.A. v. Minnesota*, 327 U. S. 558, text 564 and 565, 66 S. Ct. 794, 90 L. Ed. 851, text 857). In the case of *Bancroft Investment Company v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d. 162, there was involved a contract for the sale of lands from the federal government to the Hogan and Adams Corporation, whose interest under the contract subsequently became vested in the Bancroft Investment Corporation. It was held in this case that the equitable interest was subject to taxation. In the above cited case of *S.R.A. v. Minnesota*, the court held that the equity of a purchaser under an executory contract of sale was in fact the realty and that the title of the United States was held only as security. "This holding is consistent with the holding of this court (the Supreme Court of Florida) in *Porter v. Carroll*, 84 Fla. 62, 92 So. 809 and *Dean v. State*, 74 Fla. 277, 77 So. 107, wherein it was held that the one who holds the equitable interest is the owner for taxing purposes." (*Bancroft Investment Company v. City of Jacksonville*, 157 So. 546, 27 So. 2d. 162, text 171). The property involved in the Bancroft Investment Corporation case was held subject to taxation, subject to the rights of the federal government. In this case the court after stating that as between individuals the one holding the equitable interest under a contract of sale is the owner for taxation purposes, the court further said "such is the rule between individual vendors and vendees, and we are shown no reason why it should be different if the government happens to be the vendor."

This is a "democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted" under the provisions of §1, Art. V, or §16, Art. XVI, of the State Constitution (*Bancroft Investment Corporation v. City of Jacksonville*, supra). Whatever interest the state may have in the lands is exempt from taxation (§192.06 (1), F. S.; 51 Am. Jur. 552, §560; 61 C.J. 366, §359) unless authorized by express provision of the legislature. The equitable title of a purchaser from the government, or a homestead entryman, is subject to state taxation as soon as he becomes entitled to a conveyance although title may still remain in the government (61 C.J. 367, §361). In some states the estate of the purchaser is subject to taxation to the purchaser, at least to the extent of his equitable interest therein (61 C.J. 367-8, §361). "According to the majority rule, state lands the purchase of which has been contracted for are taxable to the vendee upon the ground that the beneficial ownership of the lands is in him and not the state" (51 Am. Jur. 448, §430).

From the above and foregoing it appears that the tax assessor probably had the right to place the interest of the vendee on the

tax roll and extend taxes thereon; however, he had no right to assess the right, title or interest of the state. The possibility of repossession by the state is not enough to block a tax assessment against the vendee or a tax sale of his interest, where the paramount right of the state is protected (see *S.R.A. v. Minnesota*, supra, L. Ed. text 858). There being no authority in the tax assessor to tax the interest of the state in the lands in question, when he assessed the lands for taxes he should be presumed to have been taxing the interest of the vendee subject to the rights of the state. This seems to answer the first question in the affirmative as to the interest of the vendee but in the negative as to the interest of the state. This leaves the taxes assessed as liens upon the interest of the vendee but not upon the interest of the state. Should the state ever repossess itself of the entire title the lien on the vendee's interest would seem to be cancelled. The foreclosure of the lien by the holder of the tax sale certificate would seem to place the purchaser in the shoes of the vendee, except as to any personal liability on the notes. He would have the right to complete the purchase of the lands according to the terms of the purchase agreement, at least until cancelled in some legal way by the trustees of the internal improvement fund or other agency holding the contract.

As it appears from the above and foregoing observations that the tax sale certificates in question are probably charges upon the interest of the vendee, they do not seem to be charges or liens upon the interest of the state. They are like the taxes assessed in the *Bancroft* case, where the taxes were charges or liens against the interest of the vendee but not against the interest of the federal government. This being true there is no basis for any cancellation of the tax sale certificates so long as the interest of the vendee remains in him; and the title will remain in him until the contract is either foreclosed, forfeited or cancelled in some legal manner. A foreclosure of the tax sale certificate, by a suit in equity or by tax deed sale, would seem to transfer the interest of the vendee to the purchaser (but would not affect the interest of the state as owner of the fee), who would then stand in the shoes of the vendee, in so far as the equitable title is concerned, and might complete the purchase of the property if he so elected.

We are inclined to think that §§270.18 et seq., F. S., are applicable to the tax certificates in question and should be followed should the state foreclose, forfeit or annul the contract in some legal manner. When §§270.16 to 270.21, F. S., (being Ch. 15641, Laws of Florida, acts of 1931) are read together it seems that not only mortgages, but also contracts of sale, were contemplated.

The above observations seem to answer the second question.

May 16, 1952—052-156.

INTERNAL IMPROVEMENT FUND—TRUSTEES—PUBLIC LANDS—SALES—TAX DEEDS—GAS AND OIL RESERVATION

QUESTION: Where the Trustees of the Internal Improvement fund of this state in making sale of public lands reserve mineral and oil rights, as required by §270.11, F. S., which lands, having been assessed for ad valorem taxes subsequent to sale, become sub-

ject to tax lien and a tax deed is issued thereon, is the reserved interest of the state in any way affected by the tax deed, in the light of §211.14, F.S.?

To: Trustees of the Internal Improvement Fund:

In all deeds for the conveyance of public lands by the Trustees of the Internal Improvement Fund "there shall be reserved for the trustees . . . an undivided three-fourths interest in . . . in all the phosphate, minerals and metals that are or may be in, on or under said lands and an undivided one-half interest in . . . all the petroleum that is or may be in, on or under said land . . ." (§270.11, F.S.). Under the taxing laws of this State "all property, real and personal, . . . of this State," is exempted from taxation (§192.06, F.S.). It is also a general rule of law that the property of a state is not subject to taxation in the absence of a statute providing therefor (61 C.J. 366, §359; 51 Am. Jur. 550, §557).

Section 211.14, F.S., provides that "Whenever any severance of title between the surface ownership of land and the sub-surface ownership of any right, title or interest in gas or oil, or both, thereunder, takes place with respect to land in this state, by any type of severing conveyance or reservation, the interest so severed or reserved shall, notwithstanding such severance or reservation, continue to be a part of the surface ownership for the purpose of all ad valorem taxation imposed by any taxing authority in this state." There is no provision in said section or in Ch. 211, F.S., manifesting any intent on the part of the Legislature to make said §211.14 applicable to the State or the reservations made in its conveyances as required by §270.11, F.S. The State is not considered to be within the purview of statutes and laws, however general and comprehensive, unless an intention to include the State is clearly manifest from such statutes or laws (51 C. J. 1103 and 1121, §§653 and 663).

Reservations of phosphate, minerals, metals and petroleum under §270.11, F.S., not being subject to ad valorem taxation under the taxing laws of the State cannot be subjected to ad valorem taxation under present state statutes and laws and therefore are not affected or divested by tax deeds based upon tax assessments against the lands sold.

The above question is answered in the negative.

BOARD OF COMMISSIONERS OF STATE INSTITUTIONS

August 12, 1952—052-247.

DEPARTMENT OF EDUCATION—ROYALTIES— COPYRIGHTED BOOK—SALES

QUESTION: Are royalties paid to the Department of Education from the sale of a copyrighted book general revenue within the meaning of §215.32, F.S.?

To: Mrs. Agnes W. Bremer, Secretary, Board of Commissioners of State Institutions:

Section 231.31, F.S., provides that ". . . revenue, including licenses, fees, imposts, or exactions collected or received under the authority of the laws of the State of Florida by each and every

state official, office, employee, bureau, division, board, commission, institution, agency or undertaking of the State of Florida shall be promptly deposited in the State treasury, and immediately credited to the appropriate fund"

Section 215.32, F.S., in pertinent part, provides that the general revenue fund "shall consist of all moneys available for the general operation of the state government collected from licenses, fees, charges, *sales*, transfers from special funds, *and moneys from every other source whatsoever . . .*" (Emphasis supplied).

There are funds excepted from the above definition of the general revenue that are enumerated in §215.32, F.S., but none are pertinent to the question you have asked.

The book in question was produced with Federal relief funds given the State of Florida as sponsor for the work. It is not disputed that the copyright title thereto is in the Board of Commissioners of State Institutions for the use and benefit of the State of Florida. See §272.01, F.S.

In view of the foregoing facts and the language of the statutes I have indicated above, it is my opinion that royalties accruing to the Board of Commissioners of State Institutions as the legal title holder of a copyright for the use and benefit of the State of Florida are general revenue within the meaning and intent of §§215.31 and 215.32, F.S., and their disposition is governed accordingly.

I have found nothing in the School Code which would indicate an intent on the part of the legislature to provide otherwise for the disposition of such funds.

Your question is therefore answered in the affirmative.

CHAPTER XVIII

PUBLIC BUSINESS

GENERAL AND MISCELLANEOUS APPROPRIATIONS

July 31, 1951—051-243.

STATE BUDGET COMMISSION—REGULATORY BOARDS AND COMMISSIONS—EXPENSES—FEES AS TRUST FUNDS

QUESTION: Where a state, under its police powers, sets up one or more regulatory boards or commissions, for the purpose of protecting and preserving the public health, welfare and safety of its people, and assesses against those regulated and supervised a regulatory fee or tax for the purpose of paying the costs and expenses of such regulation and supervision, may the State Budget Commission, under the provision of §282.002 (26), F.S., declare the same to be trust funds for such purpose?

To: Honorable Homer G. Graham, State Budget Director:

The Legislature of this State has from time to time set up many different regulatory boards and commissions designed for the protection of the public health, welfare and safety of the people of the state (Ch. 454-484, F.S.). Under these statutes a regulatory fee or tax is levied and assessed to pay costs and expenses of regulation and supervision. Originally and under the 1949 General Appropriations Act the costs and expenses of such enforcement and regulation were required to be paid from the funds collected; there was no provision of law for paying such expenses from any other funds. Under the present statutes, and since the enactment of Chapter 25068, Laws of 1949 (§§282.001 and 282.002, F.S.), there has been a specific appropriation for such enforcement and regulation in which a definite sum of money is appropriated for such enforcement and regulation (see Item 71, §1, Ch. 26859, Laws of 1951, the current General Appropriations Act). Under the said Appropriations Act the sum appropriated is payable from the General Revenue Fund without regard to the amount of fees or taxes collected for such regulatory purposes. In many cases the amount of the fees and taxes so collected will exceed the amount of the appropriation for enforcement.

It has become evident, since the adjournment of the recent Legislature, that it, by reason of error, through oversight or want of information as to the costs and expenses of enforcement, in many instances failed to provide an appropriation adequate for the necessary enforcement of some of the said regulatory statutes so as to properly preserve the public health, welfare and safety of the people of the State and their property. In many instances the specific appropriation made by the 1951 Legislature is insufficient to do much more than pay the organization expenses of the Board or Commission with little if any funds for actual enforcement and regulation.

License taxes for revenue are imposed under the taxing power of the State, while license fees and taxes for regulatory purposes are imposed under the police power of the State (53 C.J.S. 453, §3). The fact that the regulatory fee or tax fixed by the Legislature may produce an amount in excess of the costs and expenses of regulation and control will not make it a revenue measure instead of a regulatory measure (53 C.J.S. 453-4, §3) unless the difference between the fees and taxes collected and the costs of enforcement is so great as to show that the measure was primarily intended to produce revenue and the regulatory feature was merely incidental.

The fact that the license tax or fee may be directed to be paid into the General Revenue Fund does not establish it as a revenue measure instead of a regulatory one (*City of Fort Worth v. Gulf Refining Company*, 125 Tex. 512, 83 S. W. 2d 610). Fees for the regulation and licensing of architects (*Independent Graded School District v. Elliott*, 276 Ky. 790, 125 S. W. 2d 733), plumbing and heating contractors (*Roach v. City of Durham*, 204 N. C. 587, 169 S. E. 149) and for the regulation of other profession and businesses, have usually been held to be for regulation taxes and not for revenue. We are, therefore, of the opinion that the fee and taxes in question are regulatory in their nature and not for revenue purposes, although in some instances they may produce slightly more funds than are required for regulation and control. It has been held that revenue accruing under the police power of the State need not be expended for regulatory purposes alone (*State v. Tull*, Del., 8 A. 2d, text 20). Such funds usually may be paid into the General Revenue Fund (53 C. J. S. 694, §56), although they are for the purpose of regulation and for general tax or revenue purposes (*Daugherty v. Riley*, 1 Cal. 2d 298, 34 P. 2d. 1005, text 1008), especially when the costs of the regulations are paid from the general funds of the State.

Although the Legislature, by §§282.001 and 282.002, F.S., abolished all continuing appropriations for such regulatory boards and commissions, there is no indication in such legislation that the said Legislature intended to change the fees and taxes for regulatory purposes under the police power of the State into taxes for revenue under the taxing power of the State. We feel that such fees and taxes remain for regulatory purposes and not for revenue purposes, although in instances the revenues of the State may profit by reason of such statutes. The Supreme Court of California, in *Daugherty v. Riley*, Cal., 34 P. 2d 1005, text 1008, speaking of the corporate securities act of that state said that said act "is within the classification of laws passed for the protection of the public, and the funds derived therefrom are for the purpose of paying the costs of regulation and are not for general tax or revenue purposes." Although the fees and taxes in question are not strictly speaking trust funds, they are derived from levies made to raise revenue for a particular purpose and a purpose found necessary by the Legislature for the protection of the health, welfare and safety purposes. We do not think that the Legislature ever intended to channel any of such regulatory funds into the General Revenue Fund of the State for general purposes when such funds were needed for the proper protection of the health, welfare and safety of the public. In the case of a regulatory board or commission, the failure of the board or commission to have available funds for enforcement might easily

result in great damage to the public health, welfare and safety of the public. For example, the want of sufficient funds for the proper enforcement of health laws might result in an epidemic and greatly endanger public health. The funds in question are collected for *a specific use or purpose* and not for general purposes.

Under §282.002 (26), F.S., the State Budget Commission is given "power and authority to set up any other trust funds deemed necessary to . . . preserve the integrity of any funds received or collected for *any specific use or purpose*." In pursuance of this provision of the statutes we feel that the State Budget Commission, upon a showing to it:

1. There has been collected, under the provisions of a regulatory statute designed for the protection and preservation of the health, safety and welfare of the public; and,

2. The amount appropriated in the current general appropriations act for such purpose is insufficient for the enforcement of the regulatory provisions of the said statute, or of rules and regulations made pursuant thereto, necessary for the protection of the health, safety and welfare of the public; and,

3. In the absence of more funds, for such regulatory purposes, the enforcement of the said statutes and rules and regulations will break down to such an extent that the health, safety and welfare of the public, which the said statute was designed to protect, will be materially endangered;

may, in the manner set forth in §282.002 (26), F.S., set up a trust fund, out of the regulatory fees or taxes collected aforesaid, in such sum as the Board shall find to be necessary for such enforcement, not to exceed the amount of the said regulatory fees and taxes collected less the amount of the current appropriation. Only the amount found to be necessary for enforcement should be placed into the said trust fund; the total amount of the said fees and taxes over and above the appropriation should not be used unless necessary for proper enforcement. The board is the judge of the amount necessary and not the regulatory agency.

When the State Budget Commission, pursuant to §282.002 (26), F.S., creates, or provides for, a trust fund as aforesaid, the said fund becomes an appropriation under the said statute for the purposes of the trust so that payment therefrom is a payment "in pursuance of appropriations made by law," under §4, Art. IX, State Constitution.

The above observations seem to afford adequate answer to the question presented.

August 1, 1951—051-244.

STATE BUDGET COMMISSION—COMMITMENTS— EMERGENCY APPROPRIATION

QUESTION: Where the State Budget Commission, by order

of August 8, 1950, made a commitment of \$50,000.00, from the Emergency Appropriation in the 1949 General Appropriations Statute, for the purpose of financing a project not to be completed until after June 30, 1951, may obligations against such commitment be paid, from the said 1949 appropriation, after June 30, 1951?

To: Honorable Homer G. Graham, State Budget Director:

The 1949 appropriations statute (Ch. 25370, Laws of 1949), was for that period of time beginning July 1, 1949, and ending June 30, 1951; this being true, the Emergency Appropriation (§13 of said Ch. 25370) for the 1949-51 biennium has expired and the unexpended and uncontracted funds have reverted to the fund from which the said appropriation was made (the State General Fund); unless reversion was prevented by some applicable statute or law.

The second paragraph of §8 of said Ch. 25370 contains the following provision:

"Any balance remaining to the credit of the appropriation made herein not disbursed *but contracted to be expended* shall, on or before June 30th of the end of the biennial appropriation year, be certified to the Budget Commission, a copy of which certification shall be filed with Comptroller, showing in detail to whom obligated and the amount of such obligation. In the event this certification is not made and the obligation proven to be just, due and unpaid, then the same shall be paid and charged to the current year's appropriation of the department affected."

Under this provision of the 1949 appropriations statute the appropriations are extended, under the above stated circumstances, so as to permit payment of obligations incurred during the biennium after June 30, 1951; provided such obligations incurred were certified to the State Budget Commission on or before June 30, 1951.

Under the above quoted statute, payment after June 30, 1951, from the 1949 General Appropriations Statute, may be made only in case the obligation "was contracted to be expended" on or before June 30, 1951, and such obligation was "certified to the Budget Commission" on or prior to said June 30, 1951, and a copy of the said certificate was furnished the State Comptroller.

Pursuant to the above observations we think that the answer to the above question centers around the question of whether the unexpended portion of the said commitment of August 8, 1950, was *contracted to be expended* prior to June 30, 1951, within the purview of the above quoted portion of the statute. This is a question of fact to be determined by the State Budget Commission. Although we are unable to make a positive answer to the above question, we feel that the above observations will furnish the formula for answering the question.

September 17, 1951—051-321.

BUDGET COMMISSION—DEFICIENCY APPROPRIATION— RELEASE OF FUNDS

QUESTION: May the Budget Commission release funds from

the Deficiency Appropriation to the Inter-American Center Authority created by Ch. 26614, Laws of 1951?

To: Honorable Homer Graham, Budget Director, State Budget Commission:

The Deficiency Appropriation, §1, Item 77, and §16 of the General Appropriation Act of 1951, appropriated \$200,000 annually for the purpose of supplying additional funds to any State agency if the appropriations made for the agency were found to be insufficient to pay the necessary costs of proper administration of the duties assigned. Release of such funds is in the discretion of the Budget Commission, after a public hearing, the submission of evidence, and observance of other formalities set up in the Act. The release of funds from that appropriation requires the concurring vote of five members of the Budget Commission.

The formalities required for the release of funds seem to have been observed. The budget submitted for the release appears to contain no items prohibited by the statute. No appropriation was made by the Legislature for the Inter-American Center Authority. The gist of your question is whether in the absence of any appropriation by the Legislature for the agency the Inter-American Center Authority may be the beneficiary of funds from the Deficiency Appropriation.

Chapter 26614, Laws of 1951, created the Inter-American Center Authority and by specific terms made the Authority a State agency. Notwithstanding the fact that the Legislature made no appropriation for it, the statute imposed upon the agency certain duties and obligations which require the expenditure of funds, and it is my opinion that this agency is on the same basis as any other State agency so far as access to the Deficiency Appropriation is concerned.

The funds released must be accounted for in the same manner as any other State agency accounts for money appropriated to it by the Legislature. It is pointed out that §16 of the General Appropriation Act prohibits the use of any part of the Deficiency Appropriation for attorney's fees, increase of salaries or for the construction of any building, and, therefore, the released funds may not be used for any of those purposes.

PUBLIC PRINTING AND STATIONERY

July 17, 1952—052-218.

FLORIDA GEOLOGICAL SURVEY—PUBLIC PRINTING— OUT-OF-STATE

QUESTION: If the low bid made for Class B public printing is submitted by an out-of-state printing firm, may the contract be properly let to that firm when three Florida firms have submitted bids for the same job?

To: Honorable R. A. Gray, Secretary of State:

Section 283.03, F.S., provides that "All the public printing of this state shall be done in the state, and the bond given by any contractor for such printing shall so state."

The question being concerned with Class B printing, as described in §283.02, reference is made to §283.10, wherein it is required that all contracts let for Class B printing shall be only for a particular printing job and that "... each department of the state government shall call for bids from two or more printing houses within the state upon each separate job of printing ..."

In *State ex rel Arthur Kudner, Inc., vs. Lee*, (Fla.) 7 So. (2d) 110, the majority opinion of the Supreme Court was to the effect that the law required that public printing contracts be let to the lowest bidder who operated a plant in Florida and who would contract to do the job within the State of Florida, according to the specifications of the contract. As was stated by the Court, the statutes "... imply that conditions shall exist in the state under which the particular requirements for a particular job can be fulfilled, because no purpose is evidenced by the statute to handicap or restrain officers and departments in the kind of printing that they may have done. The only limitation is that if the work can be procured to be done within the State of Florida by one or two or more competing Florida firms having plants in this state, and prepared to execute the work in this state, then the class of persons who are eligible to become bidders shall be restricted to Florida concerns and Florida printing establishments only, and that no such work shall be let to any other class of bidders, nor any funds disbursed to the latter class therefor."

It is my opinion that your question should be answered in the negative.

PUBLIC BUSINESS, GENERALLY

November 29, 1951—051-433.

STATE ADVERTISING COMMISSION—PUBLICITY FOR FLORIDA—RADIO PROGRAM—FUNDS

STATEMENT and QUESTION: The Sterling Drug Company has a national radio program on the Mutual Broadcasting System covering a network of 552 radio stations. The program features Tom Moore, a well-known and popular radio personality. The program originates at present in the northern studios of the Mutual Broadcasting System. The sponsors of the program are willing to have the program originate from a radio station at Winter Haven, Florida, provided they do not incur any additional expense. The only added cost involved would be line charges for the program from Winter Haven to New York. The 30-minute daytime program would be broadcast five days a week for 13 weeks and the total amount of the line charges would be approximately \$28,600.

Various Chambers of Commerce and similar groups in the state have subscribed approximately one-half of the cost. The State Advertising Commission has been asked to pay the remaining amount of approximately \$14,300. It is agreed that on the program Mr. Moore would interview and feature prominent citizens and officials of the towns and cities of Florida as well as prominent winter visitors from other states. Although the program would freely publicize Florida, it would also carry the private commercial announcement of the sponsor.

Under these circumstances, does the Florida State Advertising Commission have legal authority to expend state funds to the extent requested in order to participate in the program?

To: *Honorable Beverly Grizzard, Acting Director, State Advertising Commission:*

Section 286.17, F.S., provides for the powers and duties of the State Advertising Commission. It provides:

"The commission, in order to promote and develop business, agriculture, industry, commerce and employment for the citizens of the state, shall have the power, and its duty shall be, to plan and conduct a program of information, advertising and publicity relating to the business, industrial, commercial, agricultural, educational, recreational, scenic, historic, transportation, and residential facilities, advantages, products and attractions of the state and all parts thereof. The commission shall encourage and so far as it is practicable to do so, co-ordinate the activities of persons, firms, associations, corporations, organizations and other governmental units and agencies engaged in publicizing and promoting such facilities, advantages, products and attractions of the state or of any part thereof."

It should be noted that the Commission is given wide discretionary powers in encouraging and coordinating the activities of persons, firms, etc., which are engaged in publicizing Florida.

Section 286.19, F.S., however, limits the expenditure of state advertising funds to certain media. Radio advertising over out-of-state networks is specifically included as one of the authorized media.

The program outlined in your inquiry would appear to meet this requirement, since it is disseminated over a national network of stations. The fact that the program itself would originate in Florida is not in my opinion material.

The Florida law creating the Advertising Commission does not prohibit the Commission from entering into a cooperative agreement with other governmental agencies or private firms for the purpose of bringing favorable publicity to the state. In fact, it specifically authorizes such cooperation in §286.17 set forth above.

In my opinion, therefore, the Florida laws governing the State Advertising Commission do not prohibit the participation of the Advertising Commission in the specific program outlined in your question and if in the discretion of the Advertising Commission the expenditure of \$14,300 of its funds for such a purpose is a wise use of said funds, the Commission has authority to do so.

This opinion is based specifically on the factual situation outlined in your question and should not be considered as applicable to any other set of circumstances wherein the State Advertising Commission contemplates the expenditure of state funds in cooperation with other agencies or private firms.

Subject to the above observation, your question is answered in the affirmative.

CHAPTER XIX

PENSIONS AND WAR VETERANS

SERVICE OFFICER

July 18, 1951—051-224.

DEPARTMENT VETERANS' AFFAIRS—MEMBERSHIP— CONGRESSIONAL DISTRICTS

QUESTION: In view of Ch. 26717, Laws of 1951, redistricting the state into eight congressional districts, will the membership of the Department of Veterans' Affairs be increased so as to permit appointment of one member from each of the eight congressional districts?

To: Honorable C. L. Clark, Governor's Office, Capitol:

Chapter 26717, Laws of 1951, amended Ch. 8, F.S., by redistricting the state into eight congressional districts, in lieu of the six previously established. It is apparent from a reading of §292.04, F.S., that this new redistricting law is potentially inconsistent with the provisions of §292.04, which states that there shall be "seven members" of the department and yet prescribes that there shall be appointed "one from each congressional district and one from the state at large."

There is, however, no immediate appointment problem, due to the fact that §2 of Ch. 26717 provides that the redistricting shall only take effect "at the expiration of the term of office of the congressmen now serving from the state." Accordingly, in any case, the specific provisions of §292.04, authorizing only seven members will undoubtedly control until the effective date of the redistricting act, which, in accordance with the provisions of the 20th Amendment to the United States Constitution will be Noon, January 3, 1953, the date of the expiration of the terms of office of the present congressmen.

Whether or not, as of Noon, January 3, 1953, two additional members may be appointed to the Department by virtue of the redistricting act raises a more complex question. Admittedly, §292.04, F.S., provides for a member "from each congressional district and one from the state at large." On the other hand, the same section specifically fixes the number of members at seven. Thus, any attempt to interpret §292.04 in the light of the revised congressional redistricting law would appear to create an irreconcilable conflict between the two provisions of this law, since it would, of course, be impossible to appoint a member from each congressional district as they will exist on January 3, 1953, as well as one from the state at large, and still limit the total number of members to seven, as stated in the statute.

There appear to be only two avenues of statutory construction available to solve this apparent dilemma. One is to assume that the

legislature intended the Department of Veterans' Affairs to consist of a member from each congressional district, subject to increase as new districts may be established, and thus consider the statute to be impliedly amended by Ch. 26717. This, however, would require ignoring the plain language of the statute, which limits the total number of members to seven and would create an inconsistency in the act resulting in an interpretation which of necessity must fail to give effect to all provisions of the statute.

The other possible solution to the problem would be to assume that the legislature intended, as it clearly stated, to limit the number of members to seven, and intended that one of such should be appointed from each congressional district *as they existed at the time the act was passed*. This latter interpretation would result in giving full effect to each of the provisions of the statute, and would eliminate any inconsistency between the various parts of the act.

In order to determine which of the two possible interpretations should be adopted, recourse may be made to several basic premises of statutory construction. Among these are the well settled rules that a construction of a statute which creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and where two constructions of a statute are possible, by one of which the entire act may be harmonious while the other will create a discord between different provisions, the former should be adopted. Also, words in a statute cannot be changed, eliminated or ignored unless clearly included by the legislature in error, or by accident or inadvertence. Even the fact that events probably not foreseen by the legislature have occurred will not permit the changing of a phrase in a statute. (See 50 Am. Jur. p. 197, et seq.) A statute must be construed as a whole, and every word in it made effective, if possible, (*Goode vs. State*, 50 Fla. 45, 39 So. 461; *Snively Groves vs. Mayo*, 135 Fla. 300, 184 So. 829; *Chiapetta vs. Jordan*, 153 Fla. 788, 16 So. 2d. 641.)

Applying these general rules of statutory construction, and after careful study of the statutes here involved, it is my opinion that the latter of the two alternatives described above provides the proper solution to the problem. Only by holding that the act limits the number of members of the Department of Veterans' Affairs to seven, one to be appointed from the state at large and one from each of the six congressional districts as they existed at the time \$292.04 was enacted, could the statute be interpreted so as to avoid the creation of an irreconcilable conflict between the various portions of the act. Only by so holding could each word and phrase of the act be made effective and harmonious, and doing violence to the plain words of the statute be avoided.

Accordingly, in my opinion, the number of members of the Department of Veterans' Affairs must be limited to seven, until \$292.04 is otherwise amended by the legislature, and the provisions of Ch. 26717, Laws of 1951, cannot be interpreted so as to increase the number of members in said Department. Your question, therefore, is answered in the negative.

LAWS RELATING TO VETERANS, GENERALLY

June 10, 1952—052-182.

CIVIL SERVICE EMPLOYEES—VETERANS—DISABILITY
PREFERENCE POINTS RETROACTIVE

QUESTION: Is a civil service employee who filed a claim for military service connected disability entitled to disability preference points retroactive to a promotional examination taken during the time when such claim was pending, upon a subsequent retroactive award of a disability pension from the date the claim was filed, such employee having notified the Civil Service Board of his pending disability claim at the time of standing the promotional examination?

To: Mr. Melvin T. Dixon, State Service Officer, St. Petersburg, Florida:

In an opinion of this office, No. 050-137, dated August 3, 1950, I concluded that a veteran should receive the preference provided by §295.09, F.S., "upon each examination he stands until he receives one promotion."

I assume this is the first promotional examination for the employee.

Section 295.07, F.S., in pertinent part provides:

"In certification for appointment . . . preference shall be given to:

(1) Those ex-servicemen and women . . . who have been separated therefrom under honorable conditions and *who have established the present existence of a service connected disability, which is compensable under public laws administered by the U. S. Veteran's administration, or who are receiving compensation, disability retirement benefits, or pension by reason of public laws . . .*" (emphasis supplied)

There is authority to the effect that legislation rewarding those who have served in the armed forces of the United States should be liberally construed. See Sutherland, Statutory Construction, §7216.

I cannot, however, even by giving credence to the above rule, conclude that the above emphasized language of §295.07, F.S., would permit reading into the provisions of §§295.07, 295.08 and 295.09, F.S., an interpretation to the effect that preference points on promotional examinations shall be given retroactively to the date any approved claim had been filed with the Veteran's Administration.

I think the above interpretation is strengthened by the language of §295.08, F.S., which reads in part: ". . . provided . . . whose service connected disability *has been rated by the veteran's administration . . .*" (emphasis supplied).

As a general rule, ". . . if the statute directs that certain acts shall be done in a specified manner, . . . their performance in any other manner than that specified . . . is impliedly prohibited." See Crawford, Statutory Construction (1940), §195.

Your question is therefore answered in the negative.

November 5, 1951—051-397.

VETERAN'S PREFERENCE—APPOINTMENT—REINSTATEMENT—REEMPLOYMENT—WIFE'S STATUS

QUESTION: Would the wife of a disabled veteran, who is receiving compensation for his disability, but who is attending school and has a teaching position in the public schools on a part-time basis, be eligible for preference in accordance with the provisions of this section (§295.07 (2), F.S.)?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

It is my opinion that the Legislature intended to provide, as indicated by §295.07, F.S., that the veteran's preference in question should be transferred to the veteran's wife only in such cases wherein the veteran personally is unable to qualify for any position.

Since the veteran contemplated in your question is employed as a teacher, the quoted statute precludes a preference being extended to his wife. The fact that such employment is part-time does not alter the situation.

Your question is therefore answered in the negative.

CHAPTER XX DRAINAGE

GENERAL DRAINAGE

February 15, 1952—052-41.

INDIAN RIVER FARMS DRAINAGE DISTRICT—MURPHY ACT LANDS—TAX ASSESSMENTS—EXEMPTIONS

QUESTION: Is the State liable for drainage assessments levied by the Indian River Farms Drainage District upon Murphy Act lands prior to and after June 9, 1939, and so long as such lands remained vested in the State, and if so from what fund are such assessments payable?

To: Trustees Internal Improvement Fund:

The Indian River Farms Drainage District was created and established under the general drainage laws of the State (now appearing as Ch. 298, F.S.) sometime prior to the enactment of Ch. 8882, Laws of Florida, Acts of 1921, which act approved, validated and confirmed the said creation and establishment of said drainage district. The levying of the benefits and assessments by the said district and its officers and agents appears to have been validated, ratified, approved and confirmed by Ch. 14737, Laws of Florida, Acts of 1931, as well as the assessments made for the years 1920 through 1929.

Title to the lands under the Murphy Act vested in the State of Florida and not in the Trustees of the Internal Improvement Fund, although the said trustees were vested with power of sale as agents of the State (see §192.38, F.S.). Title to such lands vested in the State under the general taxing laws and the rights of the former owners were divested and the title vested absolutely in the State as of June 9, 1939 (presuming, however, that the taxing proceedings were valid). It appears that drainage assessments of the said Indian River Farms Drainage District were delinquent on some of the lands under the said Murphy Act on and prior to said June 9, 1939. The Murphy Act (Ch. 18296, Laws of 1937) did not by its own force divest liens for drainage assessments, at least where the lien for drainage assessments and the lien of ad valorem taxes were of equal dignity (*Carlile v. Melbourne-Tillman Drainage District*, 143 Fla. 355, 196 So. 687; *Bice v. Haines City*, 142 Fla. 371, 195 So. 919).

Under §298.41, F.S., at least after the 1927 amendment, the lien for general drainage assessments is "of equal dignity with the liens for state and county taxes, and other taxes of equal dignity with state and county taxes." It, therefore, appears that, under the holdings in the above cases of *Carlile v. Melbourne-Tillman Drainage District* and *Bice v. Haines City*, the lien for the assessments of the said Indian River Farms Drainage District survived the Murphy Act and continued to encumber the lands. This observation relates

to the liens existing on June 9, 1939. This would seem to include the assessments levied for the year 1939 and prior years. The State took the title under the Murphy Act charged with the liens for these assessments, and sales by the State would seem to be subject to these assessment liens.

Under §298.36, F.S., "the benefits for all lands in said district *belonging to the State* shall be assessed to and the taxes thereon shall be paid by the State out of funds on hand or which may hereafter be obtained, derived from the sale of lands belonging to the State." Title to lands under the Murphy Act would seem to be lands *belonging to the State*. Murphy Act lands would seem to be subject to drainage assessments of the Indian River Farms Drainage District, under said §298.36, F.S., unless there be a subsequent enactment providing otherwise. The above quoted provision in §298.36, F.S., was inserted in the statute by Ch. 12040, Laws of 1927.

It is provided by §192.08, F.S., that "no taxes or special assessments shall be levied by any taxing district, special taxing district, or other governmental unit or agency created for purposes of taxation, against lands or other property of the State of Florida, except for the purpose of improving the actual physical condition of such lands or other property, *and for such purposes, only upon the approval of such levy by that state agency or department in which title to such lands or other property is vested, or having jurisdiction over such lands or other property.* The taxes or special assessments lawfully imposed upon lands or other property owned by the said state or by its agency shall be an obligation only upon the lands of other property against which such taxes or special assessments are lawfully imposed. The provisions of this section shall not apply to state lands or property now subject to taxes or assessments in any taxing district or special taxing district created prior to June 26, 1931." This statutory provision was inserted in the statute by Ch. 15639, Laws of 1931, and is therefore of subsequent origin to the above quoted provision from §298.36. Both of the said provisions were incorporated into the Florida Statutes which have been readopted from time to time, the last readoption having been in 1951. If there is a conflict between the said statutory provisions the provision of the later origin will control (*Hillsborough County Commissioners v. Jackson*, 58 Fla. 210, 50 So. 423, 138 A. S. R. 110, 19 Ann. Cas. 148; *Lykes Brothers v. Bigby*, 155 Fla. 580, 21 So. 2d. 37; *State v. Webb*, Fla., 49 So. 2d. 93, text 94). Section 192.08, F.S., seems to recognize existing provisions for the assessment of state lands (such as §298.36, F.S.) but puts a limitation on such assessments, in that it requires *the approval of the state agency* having jurisdiction over the lands to be assessed. So far as we are advised there has been no such approval of the assessments in question, if required.

To determine whether such approval is required we must construe the last paragraph of the section which provides that the section does not "apply to state lands or property *now* subject to taxes or assessments in any taxing district or special taxing district created prior to June 26, 1931." The district in question was created prior to said June 26, 1931, however the state's title was confirmed by the Murphy Act effective as of June 9, 1939. We are not advised of the date of the tax sale under which title vested in the state; however, we shall treat the title under the Murphy Act as having

vested in the State on June 9, 1939 for all practical purposes. The lands of the State here involved were not subject to the drainage assessments, as state lands, until long after the enactment of said Ch. 15639, Laws of 1931 (now §192.08, F.S.). It was doubtless the intention of the legislature to apply said statute to lands of the state which might otherwise become subject to drainage taxes subsequent to the effective date of the said enactment, which was June 26, 1931. We, therefore, feel that approval was required under §192.08, F.S., before Murphy Act lands became subject to the assessments of the Indian River Farms Drainage District.

We doubt the validity of the Indian River Farms Drainage District assessment in question, and do not feel that payment thereof should be made unless and until the application of said §192.08, F.S., and its effect upon the purported assessment in question, is determined by a court of competent jurisdiction. We have left undecided the question of the fund from which payment might be made, if any, although it seems possible from the language of §298.36, F.S., that said statute may have contemplated the Internal Improvement Fund.

April 30, 1952—052-139.

DRAINAGE DISTRICTS—ESTABLISHMENT—BEACHES AND BEACH FRONT PROPERTY

QUESTION: Can the provisions of Ch. 298, F. S., be invoked to permit the establishment of a district formed for the purpose of executing works to protect and benefit beaches and beach front property?

To: Honorable A. G. Matthews, Chief Engineer, Division of Water Survey and Research, State Board of Conservation:

At the time of the passage of Ch. 298, F. S., being Ch. 6458, Laws of 1913, ocean and gulf beaches and beach front property were considered to be of little utility and value, especially for commercial purposes as it is at present. Therefore, the Legislature undoubtedly had in mind, when enacting said chapter, the reclamation of lands from swampy areas, large shallow ponds, and other bodies of useless standing water through a system of canals and drainage ditches. In other words, when the original act was passed the reclamation and protection of beach property from the effects of sea water was probably not one of its purposes.

However, this will not necessarily preclude the applicability of Ch. 298, F. S., to the situation presented if such projects would otherwise fall within the scope of its provisions. A liberal construction is generally given statutes for the advancement of the public welfare or having for their end the promotion of important and beneficial public objects so as to affect their purpose (50 Am. Jur. 420, §395). And as stated in Section 237 of 50 Am. Jur. at page 224:

“... the fact that a situation is new or that a particular thing was not in existence ... at the time of the enactment of a law, does not preclude the application of the law thereto. The language of a statute may be so broad and its object so general, as to reach conditions not com-

ing into existence until a long time after its enactment. Indeed, it is a general rule of statutory construction that, in the absence of a contrary indication, legislative enactments, which are prospective in operation and which are couched in general and comprehensive terms broad enough to include unknown things that might spring into existence in the future . . . apply alike to new situations, cases, conditions . . . where such situations, cases, conditions . . . can reasonably be said to come within the general purview . . . (and) policy of the statute . . ."

A reading of Ch. 298, F.S., and especially §§298.01 and 298.22, which contain the powers given the drainage supervisors to carry out the purpose of the chapter within any particular drainage district, would indicate that this chapter is of the type of statute referred to in the above quoted passage.

However, it would appear from the provisions of Ch. 298, F. S., and particularly §298.01, that the attempted formation of a drainage district for the sole purpose of *protecting* beach property by bulkheads and other methods would not be sufficient to validly invoke the provisions of said chapter. For §298.01 provides that a drainage district to be formed for the purpose of having lands "reclaimed *and* protected" from the effects of water. Section 298.26 and other sections of the chapter deal with a "plan of reclamation." Thus, although it may be said that beaches are "wet" and "subject to overflow" (from tides) within the meaning of §298.01, F. S., unless any such project as you mention involved a reclamation of beach property from water, I do not think Chapter 298, F. S., could be used to effectuate such projects. For example, if stagnant marshes adjoined otherwise valuable beach front property or if permanent sloughs have formed on the beaches, then it would be conceivable that a drainage district could be formed to construct works to eliminate such conditions and protect the property against their recurrence.

It is, of course, settled law that such drainage districts can be formed only for a purpose involving a public benefit and cannot be utilized for private benefit alone (17 Am. Jur. 781, §5). Whether or not any such proposed district would meet this requirement will depend on the facts and circumstances in each particular case.

CHAPTER XXI

PORTS AND HARBORS

STEVEDORES

December 23, 1952—052-335.

BOARD OF PILOT COMMISSIONERS—LICENSES TO FIRMS, CORPORATIONS AND STEVEDORES

QUESTION: Is the Board of Pilot Commissioners and Port Wardens, Port of Miami, authorized under the provisions of §307.01, F.S., to grant stevedore's licenses only to individual persons to the exclusion of firms and corporations or to only firms and corporations and not to individual persons?

To: Honorable Arthur Merrill, Secretary, Board of Pilot Commissioners and Port Wardens, Port of Miami, Florida:

Section 307.01 provides, among other things, that the Board of Commissioners of Pilotage may grant licenses to competent and trustworthy persons to act as stevedores in the port and harbor for which said board is appointed.

Section 1.01 (3), F.S., defines the word person as follows:

"The word 'person' includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations and all other groups or combinations."

As to whether or not the word person as used in Ch. 307, F.S., is broad enough to authorize the Board of Commissioners of Pilotage to grant a stevedore's license to a firm or corporation is a question that has never been specifically presented to the Florida Supreme Court.

However, the Court held in *State ex rel Biscayne Stevedoring Company vs. Turner*, 196 So. 816, that the Board of Pilot Commissioners of Port Everglades could not arbitrarily deny a stevedore's license for the year 1939, to the Biscayne Stevedoring Company to service all ships in Port Everglades, after the Board had issued a license under the provision of §3860 C.G.L., 1929, to that company for the years 1932-1938. It may be implied from this decision that the Supreme Court of Florida has recognized that a firm or corporation can be granted a stevedore's license under §3860 C.G.L., 1927, (now §307.01, F.S.) That part of your question relative to the Board granting a stevedore's license to an individual person is answered in the affirmative.

HARBORMASTERS FOR CERTAIN SPECIFIED PORTS

August 3, 1951—051-258.

HARBORMASTER—DUTIES—FEES—VESSELS

QUESTIONS: 1. Is the Harbormaster of the Port of Jack-

sonville, Florida, acting within the scope of his authority in collecting a fee of ten dollars (\$10) on each vessel entering the port, even though no special service is rendered to said vessel by the Harbormaster other than his general duties of policing the harbor and carrying out his statutory duties?

2. What are the legal steps to take for collecting said fee?

To: Honorable William P. Head, Harbormaster, Jacksonville, Florida:

Section 314.08, F. S., provides that the Harbormaster shall receive from the master, owner, or consignee of vessels coming into the port for which he is appointed Harbormaster, a fee, not to exceed the sum of twenty dollars (\$20), according to the amount and value of services rendered.

The Supreme Court of Florida in the case of Vincent vs. Floss and Crabtree, 160 So. 49, held, in substance, that the Harbormaster of the Port of Jacksonville was entitled to collect a fee of ten dollars (\$10) for each and every call of vessels at the Port of Jacksonville, although said Harbormaster did not render any special or direct service to the vessel, but he did carry out his duties of policing the harbor and other statutory duties which constituted an indirect service to all vessels using the port.

The Court further held that the state statute assessing fees against vessels entering port based on the Harbormaster's services need not require any element of contract regarding services rendered when services are in connection with policing of the port for protection and convenience of vessels therein.

In view of the foregoing, it appears that the Supreme Court has already answered your first question in the affirmative. However, this is also a practical question and one in which the Harbormaster should exercise discretion, as the fee collected is to be determined solely by the value of services rendered.

Section 314.10, F. S., provides that whenever any fee or compensation due the Harbormaster is not paid within forty-eight hours from the rendition of the services for which the same is due, such officer may then demand the same from the master or his consignee, and upon refusal of payment may sue for and recover from the person owing the same double the amount which has been demanded.

Replying to your second question, it seems that the foregoing statute contemplates that the fees of the Harbormaster shall be enforced by court action. We find nothing in the statute giving the Harbormaster a lien upon the vessel for his fee. Therefore, the procedure set forth in §314.10 should be followed in collecting fees. (See AGO No. 050-256).

CHAPTER XXII

MOTOR VEHICLES

REGULATION OF TRAFFIC ON HIGHWAYS

February 5, 1952—052-29.

MOTOR VEHICLE DRIVERS—ACCIDENTS—RECKLESS DRIVING CHARGES—ENFORCEMENT OFFICERS— AUTHORITY

QUESTION: May a police officer, highway patrolman, or any law enforcement officer, prefer charges of reckless driving against the driver of an automobile involved in an accident when the officer does not witness the accident and has no witness to same?

To: Honorable C. Burton March, Clerk, Circuit Court, Sumter County, Bushnell, Florida:

Reckless driving is a crime against the laws of the State of Florida and is punishable as a misdemeanor. §317.21, F. S.

The law of Florida does not require that there shall be an actual eyewitness to a crime in order to convince the party guilty thereof. Circumstantial evidence is sufficient to sustain a conviction if it is sufficiently strong to meet the requirements of the criminal law.

The complaint or charge is the initial step in instituting the criminal action. It may be preferred by any person, whether a law enforcement officer or a private citizen. It is required to be in writing and sworn to before the committing magistrate or the prosecuting attorney.

It will be seen from §901.02, F. S., that the magistrate to whom the charge is presented is the officer who determines whether or not there is reasonable ground to believe that an offense has been committed within his jurisdiction and that the person against whom the complaint was made committed it. If he feels that the complaint, and the evidence presented to him is insufficient to show reasonable ground, he should refuse to issue a warrant of arrest and that will terminate the case. Otherwise, the warrant of arrest is issued and the case then proceeds in regular course. See also: §§901.01, 937.01 and 937.02, F. S.

It is therefore my opinion that your question should be answered in the affirmative.

June 6, 1951—051-147.

HIGHWAY PATROLMEN'S AUTHORITY—AMBULANCE DRIVER BLOCKING HIGHWAY—REMOVAL OF DEAD BODIES

STATEMENT and QUESTIONS: An automobile accident occurs in the early hours of morning on one of our State Highways,

outside of a Municipality and several persons are injured and at least one or two persons apparently killed outright. Say, that the accident is the direct result of one car being parked on the highway (being a misdemeanor). One ambulance comes up to the scene and the driver determines that two persons are dead, so that leaving those where they lie, he picks up the injured and removes them to a hospital. A state patrolman has arrived and taken charge at the scene of the accident.

Now a second ambulance approaches from the opposite direction and upon stopping near the patrolman, the patrolman instructs the driver of such ambulance (who is an undertaker) to pull over to the side of the road so as to allow cars to move in either direction and carefully by the accident. The patrolman also orders such driver not to remove the dead bodies. Notwithstanding such orders, the ambulance driver blocks the highway and proceeds to remove the dead bodies and take them away.

1. Can the driver of the ambulance be prosecuted for not obeying the officer in that he blocked the highway with his emergency vehicle?

2. Can such ambulance driver be prosecuted for removing the two dead bodies from the scene contrary to the officer's orders and in fact in defiance thereto?

To: Honorable A. C. Simmons, County Prosecuting Attorney, Fort Pierce, Florida:

AS TO QUESTION 1:

Section 321.05, F. S., provides, among other things, that patrol officers, under the direction and supervision of the director shall perform the duty, function and power, "patrol the state highways of Florida and regulate, control and direct the movement of traffic thereon; . . . to regulate and direct traffic concentrations and congestions." Under the circumstances related by you, said statute gave the highway patrolman in question the authority to lawfully order and direct the second ambulance driver "to pull over to the side of the road so as to allow cars to move in either direction and carefully by the accident."

Consequently, when said second ambulance driver blocked the highway with his ambulance after being thus ordered and directed by the highway patrolman, he violated §317.04 (3), F. S., and is subject to punishment as provided by §317.70, F. S.

AS TO QUESTION 2:

I do not know of any law under which the second ambulance driver may be prosecuted for the act of removing the two dead bodies contrary and in defiance of highway patrolman's orders. However, as hereinabove pointed out in my answer to question 1, the second ambulance driver did commit a crime when, in order to get the possession of the dead bodies and remove them, he wilfully disobeyed the highway patrolman's order "to pull over to the side of the road so as to allow cars to move in either direction and carefully by the accident." The crime consisted of wilfully disobeying an order given for the purpose of regulating traffic, not for the mere act of removing the dead bodies.

July 25, 1951—051-238.

CONSTABLES—ARRESTS—TRAFFIC VIOLATIONS

QUESTION: Does a duly elected constable of a County of the State of Florida have the authority within his district to enforce the traffic laws upon the highways of this state?

To: *Honorable Gus J. Dekle, State Representative, Perry, Florida:*

In the beginning, I think it necessary to point out that Ch. 146 is not applicable to a constable but relates only to traffic officers in such counties as have appointed traffic officers under the authority of said chapter.

It goes without saying that a constable who is a constitutional officer is a peace officer under both the constitution and the laws of the State of Florida. The applicable sections of the Florida Statutes having to do with speed restrictions on the Florida highways are §§317.22 and 317.24.

You stated in your letter that the territory involved was the incorporated community of Steinhatchee, Florida, located in Taylor County and that the State Road Department had placed signs undoubtedly under the authority of §317.24, in the Steinhatchee community, restricting the speed of motor vehicles to thirty-five miles per hour. Section 317.70 provides penalties for persons violating the traffic laws of this state, one of which is as follows:

"317.70 Penalties.—

(1) It is a misdemeanor for any person to violate any of the provisions of this chapter, unless such violation is by this chapter or other law of this state declared a felony."

Section 901.15, F.S., provides in part as follows:

"A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed a felony or *misdemeanor* or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or a violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit."

Our Court in interpreting this statute in the case of *Malone v. Howell*, 140 Fla. 693, 192 So. 224, held that an arrest without a warrant for a misdemeanor to be lawful can *only* be made where the offense was committed in the presence of the officer in such manner as to be actually detected by the officer by the use of one of his senses.

Speed traps as such are a nuisance and should not be tolerated by law enforcement officers or public minded citizens. Neither should the citizenry be required to place itself in jeopardy in the proper and legal use of the public roads of this State merely because some person does not desire to check his speed where the circumstances facing the operator of the motor vehicle demand that such speed be checked.

There is no question but that the duly elected constable has the authority within his district to arrest for misdemeanors committed in his presence and it will in all cases devolve upon the trial judge to determine if as a matter of fact a violation of the law has been committed and if such violation was actually committed in the presence of the arresting officer within the language of the foregoing case.

November 8, 1951—051-403.

MOTOR VEHICLES TRAFFIC—SCHOOL BUSES— CHILDREN—PROTECTION

QUESTIONS: 1. Is it necessary for the operator of a motor vehicle to come to a full stop when meeting a school bus which has stopped for the purpose of taking on or discharging school children on divided lane highways where there are four lanes with opposing traffic separated by a twenty foot parkway?

2. Is it necessary for the operator of a motor vehicle to dim the lights thereof for approaching traffic on divided lane highways where opposing traffic is separated by a twenty foot parkway?

3. Are four lanes, with parkway in the middle separating opposing traffic, considered to be a single highway or two one way streets or highways?

To: *Honorable H. N. Kirkman, Director, Department of Public Safety:*

In reference to your first question, please know that for the purpose of protecting children being transported to and from school, special duties are imposed by statute in this state on the operator of a motor vehicle with respect to school buses which have stopped to receive or discharge children. The law of our state requires the operator upon approaching any school bus used in transporting school children to and from school, while such bus is stopped for the purpose of taking on or discharging school children, to bring such motor vehicle to a full stop, and this is true regardless of the direction of travel from which the operator of the motor vehicle required to stop approaches the school bus.

Your attention is directed to the wording of §234.04, F.S., which requires that "any person using, operating, or driving a motor vehicle upon or over the *roads or highways* of the State of Florida, upon approaching any school bus . . . while such bus is stopped upon the roads or highways of this state, is required to bring such motor vehicle to a full stop . . ."

From the wording of the foregoing statute it is evident that the legislature in framing and passing same, recognized the well known distinction between "road" and "highway," as otherwise the statute would have logically and grammatically contained only one of such words.

Then too, Ch. 317, F.S., entitled Regulation of Travel on Highways, after defining a roadway as being "that portion of a highway improved, designed or ordinarily used for vehicular travel," defines a highway as being "the entire width between the

boundary of every way or place of whatever nature when any part thereof is open to the use of the public for vehicular travel." (§317.01 (20), (22)). In addition, the law has long recognized that the term "highway" is generic and includes all public roads, and ways. Hence, what Ch. 317 really says in this regard is that the term "roadway" covers only that territory improved, designed or ordinarily used for vehicular travel and that the term "highway" covers not only that portion used for vehicular travel but also that portion used for parkings, sidewalks and pedestrian travel.

In response to the second question, your attention is directed to §317.86, F.S. From the wording of this section it is perfectly clear that one of the purposes of said statute is to protect every operator of a motor vehicle upon the highways of this state from the glaring rays projected by oncoming traffic for a distance of not less than five hundred feet.

In reference to the third and last question, I again direct your attention to §317.01 (20), (22), F.S. It would seem that the term "highway" as used in Ch. 317, is generic and hence would include two roadways joined together by a parkway.

Therefore, it is my opinion that: (1) The law of this state requires the operator of a motor vehicle to come to a full stop when meeting a school bus which has stopped for the purpose of taking on or discharging school children on divided lane highways where there are four lanes with opposing traffic separated by a twenty foot parkway, and this is true regardless of the direction of travel from which the operator of the motor vehicle required to stop approaches the school bus. (2) The operator of a motor vehicle upon the highways of this state must dim his lights for approaching traffic, and this is true on divided lane highways where opposing traffic is separated by a twenty foot parkway. (3) In light of Ch. 317, F.S., a divided lane highway with opposing traffic separated by a twenty foot parkway, constitutes nothing more than two roadways, which in turn constitutes nothing other than a single highway.

September 26, 1951—051-334.

DEPARTMENT PUBLIC SAFETY—MOTOR VEHICLES— SIGNAL DEVICES

QUESTION: Are signal devices as provided in §317.38, F.S., as amended by Ch. 26719, Laws of 1951, required on motor vehicles operating only within the corporate limits of municipalities?

To: Colonel H. N. Kirkman, Director, Department Public Safety:

Section 317.38, F.S., as amended by Chapter 26719, supra, provides as follows:

"Section 317.38 *Signals by hand or arm or signal device.*

—The signals herein required shall be given either by means of the hand and arm or by a signal lamp or a signal device.

"It is hereby declared that a vehicle is so constructed or loaded as to prevent the hand and arm signal from

being visible, both to the front and rear, when the distance from the center of the top of the steering post to the left outside limit (or right in the case of a right-hand drive vehicle) of the body, cab, or load exceeds twenty-four (24) inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load exceeds fourteen (14) feet. The latter measurement shall apply not only to a single vehicle, but also to any combination of vehicles.

"Any vehicle or combination of vehicles constructed, loaded or capable of being loaded so as to exceed the dimensions hereinbefore promulgated shall be equipped with direction signals of a type approved by the department and said signals shall be in good working condition."

A street or highway is defined by §317.01 (22), F. S., as "The entire width between the boundary of every way or place of whatever nature when any part thereof is open to the use of the public for purposes of vehicular traffic."

In the case of *Strayer vs. Johnston*, 155 Fla. 791, 21 So. 2d. 593, our Court in construing §317.37, which relates to when a signal of intention to turn is required and §317.39, having to do with the method of giving hand and arm signals held that the requirements of these sections to the effect that hand and arm signals should be given for a distance of 100 feet before making a turn might well be reasonable as applied to motor vehicles out on the highways beyond municipal limits, but it would hardly be reasonable or practicable in incorporated cities and towns, especially in the business districts of such cities and towns. The Court pointed out that this fact was recognized by §317.04.

Section 317.04, F. S., provides that the provisions of Ch. 317, F. S., "refer exclusively to the operation of vehicles upon highways outside of municipalities except: (a) where a different place is specifically referred to in a given section. (b) The provisions of Sections 317.07-317.21, shall apply upon highways and elsewhere throughout the state."

Section 317.47, F. S., provides in part "Every motor vehicle, other than a motorcycle, shall be equipped with at least two head lamps, with at least one on each side of the front of the motor vehicle"

It should be noted that the Court in the *Johnston* case, *supra*, did not hold that a signal of intention to turn was not required within the limits of municipalities. It is my opinion that the legislature by enacting Ch. 26719, Laws of 1951, which amended §317.38, F. S., has laid down a standard for all motor vehicles in the State which come within the requirements of that statute and that all motor vehicles regardless of where they may be operated coming within the terms of this statute should be equipped with a signal device. This is the same sort of standard that was laid down for head lights in §317.47, *supra*.

A somewhat similar case arose in Jacksonville where a police officer was operating the city's automobile without a state license tag. There was a statute which provided in part "It shall be unlawful for any person to operate on or over the highways of

this state or on any road or street therein any motor vehicle which at the time of such operation shall not have affixed thereto the proper license plate" Our Court said in that case, *State ex rel Butler vs. Cahoon*, 143 So. 253:

"As the identification tag required by statute had not been procured and placed on the automobile within the time and in the manner provided by law, it was *unlawful* for the police officer to use the automobile in that condition on the public highways of the State of Florida, and the streets of Jacksonville constitute a part of the public highways of the State."

Section 317.71, Florida Statutes, provides:

"This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it."

Section 320.55, Florida Statutes, provides:

"It is unlawful for any municipal corporation to pass or attempt to enforce any ordinance in conflict with the provisions of this chapter or *chapter 317*; provided, however, that this section shall not apply to school zones."

Chapter 26719, amending §317.38, relates to required safety devices rather than to the mode or manner of operation of motor vehicles. It is my opinion that §§317.04 and 317.38, as amended, can each be given meaning and when construed together and considering the other statutes and authorities heretofore cited, it is obvious that the legislative intent was that these signal devices be required on motor vehicles of a certain description, regardless of where or by whom the vehicle may be operated. Therefore your question is answered in the affirmative.

It is recognized that in some instances it will be impractical if not impossible to install these signal devices on certain vehicles due to their special design and construction and in such cases, in order to carry out the intent and purpose of this act, the Department of Public Safety may approve a special type of signal device for said vehicle.

November 26, 1951—051-426.

MUNICIPALITIES—MOTOR VEHICLE OPERATORS— "OFFICIAL TRAFFIC-CONTROL DEVICES"—VIOLATIONS

QUESTION: Is the operator of a motor vehicle who fails to obey the instructions of an "official traffic-control device", which is located within the corporate limits of a municipality, subject to prosecution under the provisions of Ch. 317, F.S.?

To: *Honorable Wayne Allen, Judge, Court of Crimes, Miami, Florida:*

The "official traffic-control device", referred to in §317.05, F.S., is defined in §317.01 (12), as "All signs, signals, markings, and devices, not inconsistent with this chapter, placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning or guiding traffic."

Certainly, the phrases contained in §§317.01 (12) and 317.05, F.S., would lead an ordinary prudent person to believe that the legislative intent was that §317.05 apply within a municipality as well as without. I have in mind the phrase "motorman of a street car" in §317.05, and the phrase "placed or erected by authority of a public body" which is found in §317.01 (12) the defining section. Such legislative intent must necessarily be inferred from the use of these phrases because the operation of street cars is generally (if not always in Florida) thought of as being conducted within municipal limits and a municipality is definitely a public body within the meaning of §317.01 (12).

The choice of words employed by the legislature, with respect to §§317.04 (1), 317.05 and 317.01 (12), F.S., which when considered together, makes it mandatory for one attempting to interpret the meaning of said sections to resort to inferences in order to discover the true legislative intent.

From §317.04 (1), it is clear that the provisions of Ch. 317, (other than §§317.07-317.21 not here material) do not apply to a municipality unless "specifically referred to in a given section". However, I find specific reference to municipalities in §317.05, in that said section refers, among other things, to both street cars and traffic-control devices.

Although statutes which form the basis of a criminal prosecution are generally required to be strictly construed, this is not always true when the general welfare and safety of the people are involved.

Therefore, your question is answered in the affirmative, which seems to be in accord with the views heretofore expressed by this office in an opinion rendered on September 26, 1951, numbered 051-334.

December 17, 1951—051-460.

MOTOR VEHICLES—DRIVERS—ACCIDENTS—PEACE OFFICERS—NOTICE TO

QUESTION: Does §317.12 require the driver of a vehicle involved in an accident resulting only in slight injury to his person and damage to his vehicle and to no other person require said driver to give notice of such accident to the proper authorities where no other automobile is involved in said accident?

To: *Honorable B. A. Bittan, Jr., County Prosecuting Attorney, Fort Pierce, Florida:*

Section 317.01 defines "person" within the meaning of Ch. 317, F.S. Then §317.12 (1) states that "The driver of a vehicle involved in an accident resulting in injury to, or death of, any person shall immediately by the quickest means of communication give notice of such accident to the local police department, if such accident occurs within a municipality; otherwise, to the office of the county sheriff or the nearest office or station of the Florida Highway Patrol."

From a careful perusal of Ch. 317, F.S. in its entirety, I find nothing therein which indicates that the legislature intended to ex-

empt or exclude any person whomsoever from the terms of §317.12 (1), supra, and then too, the statutes involved form a basis for criminal prosecutions and should be strictly construed.

Your question is answered in the affirmative.

December 18, 1952—052-329.

COUNTY ROADS—SPEED ZONES—ESTABLISHMENT

QUESTION: Upon whom is the responsibility for the establishment of speed zones outside of municipalities on other than state roads or highways?

To: Mr. H. A. Morris, Director, Escambia County Highway Patrol:

Section 317.01 (22), F.S., defines a street or highway as: "The entire width between the boundary of every way or place of whatever nature when any part thereof is open to the use of the public for purposes of vehicular traffic." It is to be noted that the definition makes no distinction between a state or county highway as such.

Section 317.24, F.S., permits the State Road Department, upon the basis of a traffic survey "... upon any part of a highway outside of municipalities ..." to declare a safe speed limit which is effective after the erection of appropriate signs.

We should also consider the provisions of §317.82, F.S., which statute is a portion of the "Florida Motor Vehicle Safety Act." An examination of this act indicates its purpose in the main to be the regulation of the weight and size of motor vehicles using the highways of the state. Said §317.82, in substance permits the State Road Department, with respect to state highways and the local authorities with respect to highways under their jurisdiction, to prescribe "... loads, weights and speed limits lower than the limits prescribed in §§317.73-317.95 and other laws ..." when damage may be done by motor vehicles traversing the same "... if the gross weight and/or speed limit thereof shall exceed the limits prescribed in said notice ..." There is a limitation upon the local authorities, to the extent that the regulation must not interfere with traffic over state highways, including cases where such traffic passes over streets or highways solely within the jurisdiction of the local authorities, unless the restrictions shall have first been approved by the State Road Department. Also, the proviso in the statute gives the "county road authorities" full power to further regulate weights of vehicles upon bridges and culverts, with respect to county roads.

The provisions of §317.24, F.S., in the main relate to the safety of the public, while §317.82 has as its purpose, the preservation of the public highways of the state. Inasmuch as the county derives its power to regulate speed under §317.82, it may, by following the procedure described therein, set a speed limit only where damage may be done a county highway. Under §317.24, F.S., the State Road Department may, after making the required survey, and without taking into consideration any resulting damage from vehicular traffic, prescribe a speed limit.

The State Road Department has, after following the procedure set forth in §317.24, the authority to regulate the speed on a county

road. The county likewise has such authority, but only when based upon damage which may result to the highway from vehicular traffic by reason of its weight or load.

We are informed by the State Road Department that while in rare instances it has made traffic surveys upon county highways, followed by recommendations, the matter of erection and maintenance of appropriate signs, as well as the enforcement of the regulations, has been left entirely with the county concerned.

TITLE CERTIFICATES

March 12, 1952—052-82.

MOTOR VEHICLE COMMISSIONER'S OFFICE, TALLAHASSEE—LIENS FILED IN

QUESTION: When are liens considered as filed under the terms of §319.15, F.S.? When submitted to an agent of the Motor Vehicle Commissioner in the field, or when actually received for filing at the office of the Motor Vehicle Commissioner?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

The "office of the Motor Vehicle Commissioner" referred to in §319.15, is provided for, in §318.08, F.S., which reads: "The offices of the state motor vehicle commissioner. . . shall be in the building provided by the state for the use of the state road department. . ."

Certainly, the purpose of §319.15, supra, is to protect "lien holders" and "purchasers without notice" and prevent confusion in ownership of motor vehicles in this state.

When our Motor Vehicle laws are read in *pari materia*, I find nothing that authorizes, nor anything that indicates that the legislature intended for, liens to be filed at a place other than the office of the Motor Vehicle Commissioner at Tallahassee.

Under modern practice, regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice, or affects private rights, is filed only when deposited with the proper officer at his office for this special purpose, and it is not deemed to be filed when it is delivered to the recording officer at a place other than his office, even though he endorses it as filed at the time of delivery. But a paper left with an officer out of his office becomes filed when he deposits it in his office. Such filing, however, does not then relate back to the time when he received the paper. (45 Am. Jur. p. 450).

It is my opinion that a lien becomes filed under the terms of §319.15, only when it is deposited, for the purpose of being recorded, in the Tallahassee office of the Motor Vehicle Commissioner of the State of Florida.

CLARIFICATION OF OPINION NO. 052-82

June 17, 1952—052-187.

MOTOR VEHICLE COMMISSIONER'S OFFICE—LIENS FILED IN

QUESTION: When are liens considered as filed under the terms of §319.15, F.S.; when submitted to an agent of the Motor

Vehicle Commissioner in the field, or when actually received for filing at the office of the Motor Vehicle Commissioner?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

In former opinion No. 052-82 referred to above I held that in my opinion "a lien becomes filed under the terms of §319.15, F. S., only when it is deposited, for the purpose of being recorded, in the Tallahassee office of the Motor Vehicle Commissioner of the State of Florida.

In *Inman v. Rowsey* (Fla.), 41 So. 2d. 655, the Florida Court held that a seller, delivering possession of automobile to buyer in California paying small amount down and having five days under an unrecorded conditional sales contract to pay balance of over \$2,000, *could not* enforce the conditional sales contract against innocent Florida purchaser for value without notice of seller's lien, where contract was not filed for record in office of Florida Motor Vehicle Commissioner as required by statute, saying: "So we think that Rowsey should have complied with Section 319.15, F.S.A., and not having done so, the purchasers for value and without notice in Florida, . . . can raise the shield of this statute for their protection."

Though there is language in the title of Ch. 23658, Laws of 1947, incorporated in §§319.20-319.34, F.S., and specifically in §319.27, F.S., which superficially might give the impression that §319.15, F. S., was repealed thereby, nevertheless that section was specifically saved from repeal by §16, Ch. 23658, Laws of 1947.

And though I express no opinion as to the constitutionality of the act of 1947, in general, an act, the title of which is insufficient, becomes valid by incorporation in a general revision of the laws whether the insufficiency has been adjudicated or not. See *State ex rel. Badgett v. Lee*, 156 Fla. 291, 22 So. 2d. 804.

A careful reading of §319.27, F. S., reveals nothing that authorizes, nor indicates other than that the legislature intended for liens to be "recorded" (§319.15, F.S.) or "noted . . . by the commissioner" (§319.27, F.S.) other than at the office of the Motor Vehicle Commissioner at Tallahassee.

My opinion is therefore that the former opinion, No. 052-82, is correct, and it is hereby affirmed.

October 6, 1952—052-287.

TITLE CERTIFICATES—MOTOR VEHICLES—SEIZURE AND SALE—FEDERAL TAX LIEN

QUESTION: Where a purchaser of a motor vehicle, at a sale by federal officers pursuant to a seizure thereof pursuant to a federal tax lien, presents his title papers to motor vehicle commissioner and makes application for a title certificate, what liens, if any, appearing from the records of the motor vehicle commissioner, should be entered on the said title certificate?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

Federal tax liens are creatures of statute and their scope and

effect must be determined in the light of controlling statutes and decisions interpretative thereof (47 C. J. S. 989 §758). Federal statutes control the matter of federal tax liens, and in the absence of congressional consent, no state statute may affect such liens (47 C. J. S. 990, §759). The federal lien for taxes is upon "all property and rights of property, whether real or personal, belonging to" the taxpayer (§3670, Title 26, U. S. Code); however, such lien is not "valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the collector" in accordance with the requirements of §3672, Title 26 of the U. S. Code. This notice must be filed "in accordance with the law of the state or territory in which the property subject to the lien is situated; whenever the state or territory has by law provided for the filing of such notice" (§3672, Title 26, U. S. Code). Title 26, §3672, of the U. S. Code was derived from §3186 of the R. S. of the U. S. as amended by subsequent federal enactments.

The State of Florida, by Ch. 14757, Acts of 1931, authorized "the filing of notices of liens in accordance with the provisions of §3186 of the R. S. of the U. S., as amended by the Act of March 4, 1913, 37 Statutes at Large, page 1016, and any acts or parts of acts amendatory thereof." (§2 of said Ch. 14757). Said Ch. 14757 was brought forward into the Florida Statutes and now appears as §28.20 thereof. Long prior to 1931 the statutes of this state provided for the recording of chattel mortgages (§3833, R. G. S.), livestock mortgages (Ch. 7936, Laws of 1919), crop mortgages (Ch. 10279, Laws of 1925), conditional sales (§3871, R. G. S.), and probably other instruments. The Legislature, when it enacted Ch. 14757, Laws of 1931, now appearing as §28.20 F. S., evidently thought that special provision was required to make effective the federal statute providing for recording pursuant to state law.

Let us next examine the statutes of this state providing for or requiring the filing of certain instruments with the motor vehicle commissioner in order to be effective against purchasers for value without notice. The first such act appears to have been Ch. 20917, Laws of 1941, also appearing as §319.15-319.19, F. S., and Ch. 23658, Laws of 1947, also appearing as §319.19-319.34, F. S. These statutes were cast in general terms without express mention of the United States or its tax and other liens against property, although the general terms apply to all mortgages, conditional sales, etc., encumbering the motor vehicle in question. The government and its agencies are not to be considered as within the purview of statutes however general and comprehensive their language unless a clear intention to include it appears therefrom (59 C. J. 1103, §653; *U. S. v. Mayo*, DC Fla., 47 Fed. Supp. 552, affirmed in *Mayo v. U. S.* 319 U. S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504). While there existed statutes and laws relative to the recording of chattel mortgages, retained title contracts, etc., generally the Legislature, notwithstanding these statutes, enacted what is now §28.20, F. S.; nor has the Legislature made any change in said section when it adopted the several revisions of the Florida Statutes made since 1941.

Upon reading §§319.15 and 319.27, F. S., we get the impression that said statutes relate to specific liens and instruments and not to general liens and instruments; reference is made therein to

retain title contracts, conditional sales, trust receipts and other instruments specifically describing the motor vehicle, but no reference is made therein to general liens and the like. It therefore seems that the instruments referred to in said sections are specific liens and instruments relating to the motor vehicle specifically and not as included in general terms. (See opinion of July 25, 1949, 049-252). It is therefore our opinion that federal tax liens should be filed and recorded pursuant to §28.20, F.S., and not pursuant to §28.20, and not pursuant to §§319.15 and 319.27; however, this is a matter that can be finally determined only by the courts.

Section 319.28, F.S., makes provision for the issuance of certificates pursuant to transfers by operation of law, including transfers pursuant to bankruptcy proceedings, attachment, execution and other judicial sales; the fact that the statutes include bankruptcy sales would indicate that transfers by operation of federal laws as well as state laws are included. Section 319.28 (3) seems to be especially applicable in cases of judicial and similar sales made pursuant to liens and proceedings not of record in the office of the Motor Vehicle Commissioner.

These observations seem to answer the above stated questions, with the procedure set out in subsection (3) above cited.

LICENSES

March 2, 1951—051-45.

NONRESIDENTS—MOTOR VEHICLES—REGISTRATION REQUIREMENTS

QUESTION: Can John Doe, a resident of New York state and having a child in our public schools, legally operate a motor vehicle registered and licensed under the laws of the state of New York and bearing a New York license plate over the public roads or highways of Florida when it develops that the automobile which he is so operating belongs to another person?

To: Honorable A. C. Simmons, County Prosecuting Attorney, Ft. Pierce, Florida:

Section 320.37, F.S., relative to registration and display of license number plates, provides that it does not apply to a motor vehicle owned by a nonresident of this state other than a foreign corporation doing business in this state, provided the owner thereof has complied with the laws of the foreign country, state, territory, etc., of his residence relative to motor vehicles and the operation thereof.

It will be noted that §320.38, F.S., requires the person who is gainfully employed or has his children in our schools *to register his motor vehicle in this state if such motor vehicles are proposed to be operated on the highways of this state.*

This seems to me to have two conditions: (1) that the children be his children or that he be gainfully employed, etc., and (2) that the motor vehicle be his motor vehicle or that of his family, such as wife.

Where the foreign automobile is legitimately in this state and the owner is also present in this state and has merely loaned his automobile to someone to use temporarily, it is my opinion that such vehicle would not require a Florida license plate. If, however, it is made to appear that the owner of said vehicle is not in this state or that the use of the automobile is the result of a plan or scheme to avoid the provisions of §320.38, F. S., then, of course, a Florida license plate would be required.

October 15, 1952—052-293.

MOTOR VEHICLES—REGISTRATIONS—NONRESIDENTS—EXEMPTIONS

QUESTION: To what extent should the provisions of the Federal Soldiers' and Sailors' Civil Relief Act be applied by the Motor Vehicle Commission of the State of Florida in granting exemptions from the purchase of Florida automobile license tags under the following factual conditions: When the wife or member of the immediate family of a serviceman stationed in Florida is employed as a school teacher or in other gainful employment within the state, and operates a motor vehicle owned by the serviceman, which is properly registered in his home state, for the purpose of transportation to and from such place of employment?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

It should be noted that the first paragraph of §320.38, F.S., requires a nonresident who is gainfully employed to register his motor vehicle in this state "if such motor vehicles are proposed to be operated on the highways of the State of Florida." It seems apparent from the legislative language employed that the duties and taxes imposed are upon the vehicle and its use upon the highways rather than upon the technical owner thereof. Accordingly, I think a reasonable interpretation of the section would require a nonresident to purchase a Florida automobile license tag should he, or his wife, or an immediate member of his family, or any other person propose to operate his vehicle "on the highways of the State of Florida" in connection with any trade, profession or occupation. Any other interpretation would allow the spirit of the law to be easily circumvented. The State of Florida would, for instance, be powerless to prevent a serviceman stationed in Florida from registering a fleet of taxicabs in Georgia and permitting his wife or other person who was not the legal owner to operate them in Florida without a Florida license plate.

Section 574, Title 50 App., U. S. C. A., generally exempts all personal property of a member of the armed forces, including motor vehicles, from state taxation, including license taxes, so long as they have paid similar taxes imposed by the state of their residence, and from which state they are absent "solely by reason of . . . military or naval order."

The Federal Statute, however, contains the following significant proviso:

"Provided, that nothing contained in this Section shall prevent taxation by any State, Territory, possession, or po-

litical subdivision of any of the foregoing, or the District of Columbia *in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction.*" (Emphasis supplied)

Since the Federal Statute does not except from state taxation personal property when such property is "used in or arising from a trade or business", I think it follows that Congress did not intend that a dependent, relative, wife or friend, who is the permittee user of such property should have a greater degree of exemption from state taxation than is contemplated for the member of the armed forces himself.

It is my opinion that the serviceman owner of a motor vehicle lawfully registered in some other state is required to purchase a Florida license plate for his automobile if he chooses to permit another to use such vehicle in connection with a trade or business operation in Florida.

May 23, 1952—052-161.

SECONDHAND DEALERS LICENSE—OFFICE BUILDING— USE

QUESTION: May the building or structure used as an office by secondhand dealers, as required by §320.27, F.S., be used for purposes other than such office?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

In general the intention and meaning of the legislature must be determined primarily from the language of the statute itself and not from conjecture. When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction. The statute must be given its plain and obvious meaning. See *State v. Burr*, 79 Fla. 290, 84 So. 61; *Douglass, Inc. v. McRaney*, 102 Fla. 1141, 137 So. 157; *State v. Amos*, 76 Fla. 26, 79 So. 433; *Armistead v. State*, (Fla.) 41 So. 2d 879; and *Ross v. Gore*, (Fla.) 48 So. 2d 412.

The clear and unambiguous statutory requirements of §320.27 (2), F.S., are simply that the building or structure used as the office of a secondhand dealer must be a permanent location, and type of construction. It must be a suitable place where applicant can in good faith carry on his business and keep and maintain the necessary books, records and files. It cannot be his place of residence.

To read into such statutory language a prohibition against the use of the building or structure for any other purpose than as the office of the secondhand dealer would do violence to the obvious intent and effect of the language used. See *In re Ratliff's Estate*, 137 Fla. 229, 188 So. 128; *Maryland Casualty Corp. v. Sutherland*, 125 Fla. 282, 169 So. 679.

I assume that if the building is used for some other purpose it will be a lawful purpose and not a public nuisance.

I also assume that the use of the location and structure is otherwise in compliance with the requirements of §320.27, F.S.

Subject to the above indicated reservations, your question is answered in the affirmative.

June 21, 1951—051-175.

HOUSE TRAILERS OCCUPIED BY MEMBERS ARMED FORCES—OFF MILITARY BASES—LICENSE

QUESTION: Are house trailers, occupied by members of the Armed Forces of the United States, located off military or naval bases but not used on the highways, subject to either personal property tax in accordance with §200.45, F.S., or license fees for trailer coaches according to §320.081, F.S.?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

The facts related do not disclose the exact status of the house trailers in question. In considering the problems involved, I have assumed that the trailers are vehicles in the ordinary accepted meaning and they have not been converted into permanent dwelling houses which would necessitate consideration of their taxable status as real rather than personal property.

It is my opinion that when house trailers, owned by members of the armed forces of the United States, come to rest in Florida, with out of state motor vehicle license plates, there are three avenues open to such owner members upon the expiration date of the license plate of the house trailers, to come within and conform to the provisions of the Soldiers and Sailors relief act, copy of which you submitted.

(1) The personal property tax as required in §200.45, F.S., may be paid.

(2) The license fee for trailer coaches required, (this tax shall be in lieu of all other taxes) in accordance with §320.081, F.S., may be obtained.

(3) A new and current license plate may be obtained from the sister state, domicile or legal residence of the owner.

The Soldiers and Sailors Civil Relief Act of 1940, as amended, and as extended by the Selective Service Act of 1948, provides in §514 (2) "(a) the term 'personal property' shall include tangible and intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: *Provided*, that the license, fee, or excise required by the State, Territory, Possession or District of Columbia of which the person is a resident or in which he is domiciled has been paid. (As added by Act of October 6, 1942; as amended by Act of July 3, 1944)".

House trailers are required to carry license plates and the plain terms of the above act under 514 (2) (b) require that they carry license plates wherever their owner members of the armed forces of the United States be located while on duty under orders and to require such license plates for house trailers would work no hardship upon members of our Armed Forces while in service, inconsistent with the Congressional Act, part of which was quoted above.

November 6, 1952—052-310.

MOTOR VEHICLES—LICENSES—SERVICEMAN,
RESIDENT OF FLORIDA

QUESTION: Is a serviceman who owns and operates a motor vehicle in Florida registered in another state required to license the motor vehicle in the State of Florida if he is registered to vote in this county and State?

To: Honorable Lamar Braley, Constable, Parker, Florida:

Section 97.041, F. S., provides:

"Qualification to register.—Any person twenty-one years of age, at the time of registration, upon proof of his birth date, who is a citizen of the United States, a permanent resident living in Florida for one year and residing in the county where he wishes to register for six months, is eligible to register with the supervisor when the registration books are open. Naturalized citizens must present to the registration officer a certificate of naturalization or certified copy thereof. The following persons are not entitled to vote:

- "1. Persons not registered.*
- "2. Persons under guardianship or confined in a state prison.*
- "3. Persons insane or idiotic.*
- "4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.*
- "5. Persons convicted of bribery, perjury, larceny or any infamous crime in this or other states, or interested in any wager depending on the result of any election." (Emphasis supplied)*

Section 97.051, F. S., provides:

"Oath and identification of elector for registration.—A person making application for registration as an elector shall take the following oath: 'I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and of Florida; that I am twenty-one years old, a resident of Florida for one year and of this county for six months; that I am a citizen of the United States and qualified to vote under the Constitution and laws of the State.' The person must also state under oath, to be administered by the registration officer, whether he is registered in any other jurisdiction. If he answers affirmatively, the registration officer shall notify the supervisor in that jurisdiction to cancel the prior registration. He shall also give a sufficient description of himself as to reasonably identify his person." (Emphasis supplied)

Section 320.37, F. S., provides:

"Registration not to apply to nonresidents.—The provisions of this chapter relative to registration and display of

license number plates shall not apply to a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state; provided, that the owner thereof shall have complied with the provisions of the law of the foreign country, state, territory or federal district of his residence, relative to motor vehicles and the operation thereof, and shall conspicuously display his registration number as required thereby; but such exemption shall not apply to motor vehicles operated for hire." (Emphasis supplied)

Section 320.38, F. S., in pertinent part, provides:

"When nonresident exemption not allowed.—The provisions of law authorizing the operation of law authorizing the operation of motor vehicles over the highways of the State of Florida by nonresidents of this state, when such vehicles shall be duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident who shall accept employment, or engage in any trade, profession or occupation in this state. In every case where a nonresident shall accept employment, or engage in any trade, profession or occupation in the State of Florida, or shall enter his children to be educated in the public schools of the State of Florida, such nonresident shall be required to register his motor vehicles in this state, if such motor vehicles are proposed to be operated on the highways of the State of Florida." (Emphasis supplied)

And §574, Title 50 App., United States Code Annotated, generally exempts all personal property of a member of the armed forces, including motor vehicles, from state taxation, including license taxes, *so long as they have paid similar taxes imposed by the state of their residence, and from which state they are absent, "solely by reason of . . . military or naval service."*

The above quoted sections of the Florida and Federal law must be considered in attempting to answer your question. I find no judicial decision which would afford an answer.

In my opinion, it is apparent that the Federal law cited which grants tax relief to servicemen under certain circumstances is intended solely to protect *nonresident* members of the armed services from taxation by a state when their presence in the state is compelled by military duty and there is no intent on the serviceman's part to change his permanent residence to the state where he is presently on military duty.

The Federal Soldiers and Sailors Civil Relief Act was not intended to prohibit the right of a serviceman to change his place of permanent residence if he so desires. Obviously if a serviceman chooses to change his permanent residence to Florida he would not come within the exemption to Florida taxes provided by §574, Title 50 App., United States Code.

Since it is a prerequisite for an elector who wishes to vote in Florida, to take an oath that he is a *resident of Florida*, it must be assumed that in fact and in intent the serviceman contemplated

in your question is a permanent resident of Florida and therefore subject to the Florida law regarding taxation of motor vehicles.

Your question is therefore answered in the affirmative.

August 25, 1952—052-263.

STATE BUDGET COMMISSION—MOTOR VEHICLE TAGS— TRUST FUND

May the State Budget Commission, upon a showing by the State Motor Vehicle Commissioner that it is not possible for his office to pay the expenses of procuring motor vehicle tags on the appropriation provided, set up a trust fund, under §282.002 (26), F.S., for the purpose of paying for motor vehicle tags?

To: *State Budget Commission, C A P I T O L:*

Prior to the enactment of Ch. 25068, Laws of 1949 (now appearing as §§282.001 and 282.002, F.S.) abolishing most continuing appropriations in this State, there were three sections of the statutes here material:

“318.06 Funds from which salaries, expenses, etc., to be paid—Salaries of the state motor vehicle commissioner, auditors and all clerical help employed in the administration of the motor vehicle laws, together with the actual, reasonable and necessary traveling expenses of the state motor vehicle commissioner when absent from the capitol on official business connected with the duties of his office, *shall be payable out of the funds derived from licenses, registration and other fees collected under the motor vehicle laws*, and counted as part of the expense of administration of said laws.” (F.S., 1949.)

“320.20 Disposition of license moneys—All moneys paid into the state treasury under the provisions of law relative to the licensing of motor vehicles, except such part as shall be first set aside by the state motor vehicle commissioner and placed in the motor vehicle expense fund *to pay for number plates, postage and transportation charges on same* and the actual clerical work and operating expenses required under the law to administer the provisions of this chapter shall be apportioned and appropriated as follows:

The entire proceeds shall be paid into the state treasury to the credit of the county school fund.” (F.S., 1949.)

“320.21 Motor vehicle expense fund—The sum of money which shall be set aside by the state motor vehicle commissioner for number plates, postage, actual clerical work and other necessary expenses, as provided for in this chapter, shall be placed to the credit of said motor vehicle expense fund which said fund is hereby appropriated and made available from time to time for the purpose for which it was created to be expended upon vouchers against the same approved by the state motor vehicle commissioner

and paid pursuant to warrants drawn by the comptroller upon the state treasury against the said motor vehicle expense fund herein before mentioned." (F.S., 1949.)

In order to conform the several sections of the statutes affected by said Ch. 25068, Laws of Florida, Acts of 1949, to its provisions (180 or more sections of the statutes) the Legislature enacted Ch. 26869, Laws of Florida, Acts of 1951, by which §§318.06 and 320.20, F.S., were amended and 320.21, F.S., was repealed. Said §§318.06 and 320.20, F.S., as amended provide as follows:

"318.06 Funds from which salaries, expenses, etc., to be paid—Salaries of the state motor vehicle commissioner, auditors and all clerical help employed in the administration of the motor vehicle laws, together with the actual, reasonable and necessary traveling expenses of the state motor vehicle commissioner when absent from the capitol on official business connected with the duties of his office, shall be payable out of the general revenue fund and sufficient appropriation therefor shall be included in the biennial appropriation act and counted as part of the expense of administration of said laws." (F.S., 1951)

"320.20 Disposition of license moneys—All moneys paid into the state treasury under the provisions of law relative to the licensing of motor vehicles, shall be deposited in the general revenue fund." (F.S., 1951).

It is noted from the above quoted prior and present statutes that the amendment in 1951 omitted the following language from §320.20, to-wit, "to pay for number plates, postage and transportation charges on same." Section 320.21, which set up the fund from which such charges were previously paid, was repealed by the said 1951 amendment. The preamble to Ch. 26869, Laws of 1951, clearly shows an intent on the part of the Legislature to conform the several sections therein mentioned to Ch. 25068, Laws of 1949, now appearing as §§282.001 and 282.002, F.S.

Under §318.06 above, the salaries and expenses of the motor vehicle department were "payable out of the funds derived from licenses, registration and other fees collected under the motor vehicle laws" as was the cost of "number plates, postage and transportation charges on same". (§320.20, F.S.). Such payments were from the motor vehicle expense fund set up by §321.21, F.S. Prior to 1951 "all moneys paid into the state treasury under the provisions of law relative to the licensing of motor vehicles, except . . . the motor vehicle fund . . . (were) paid into the state treasury to the credit of the county school fund." (§320.20, F.S.).

The licensing and registration of motor vehicles in this State seem to be dual in purpose; the primary purpose being regulation and the secondary purpose the raising of revenue (see 5 Am. Jur. 567, §91; 60 C. J. S. 238, §59). The Legislature, under police power, has imposed rigid restrictions, restraints and regulations upon the use of motor vehicles in this State (*Greene v. Miller*, 102 Fla. 767, 136 So. 532) and motor vehicles may only be lawfully operated in this State under the motor vehicle license and the laws regulating the use of motor vehicles (*Re. Jones*, 130 Fla. 667, 178 So. 424,

Engleman v. Traeger, 102 Fla. 756, 136 So. 527). No person has the right to use a motor vehicle upon the highways of this State except pursuant to the license issued to its owner (Greene v. Miller, supra, Herr v. Butler, 101 Fla. 1125, 132 So. 815). Under the statutes of the State in force when Ch. 25068, Laws of 1949, was enacted (now appearing as §§282.001 and 282.002, F.S.), a portion of the fees received from the sale of motor vehicle license tags was set aside and used in the enforcement of the statutes regulating the licensing and regulating the use of motor vehicles in this state. The fees paid for motor vehicle license tags were both a regulatory fee and a license tax for revenue purposes; as were also the fees paid in connection with the issuance of title certificates to motor vehicle owners. There was set aside for regulation a portion of the fees for motor vehicle licenses and title registration, which portion was appropriated for regulatory purposes.

Without sufficient funds to carry out the statutes providing for the regulation of the use of motor vehicles in this state (under the police powers of the state) such regulation will break down to the great detriment of the people of the state. The procuring of motor vehicle tags to be issued by the motor vehicle department under the licensing statutes and laws of this state is absolutely necessary to the regulation of the motor vehicle owned and used within this state upon its highways. Unless license tags are procured by the motor vehicle commissioner for such purpose the licensing and regulation of motor vehicles in this state will, sooner or later, break down and become ineffective.

Should the State Budget Commission find that there was not sufficient funds appropriated by the Legislature to enable the motor vehicle commissioner to procure motor vehicle tags necessary for the proper licensing of the motor vehicles owned and operated in this state and further find that there is grave danger of the enforcement of the statutes and laws relating to the licensing and regulation of motor vehicles in this state, we feel that it has authority, under §282.002 (26) F.S., to create a trust fund, from the portion of the fees for motor vehicle license tags formerly going for the enforcement of such laws, for the use of the motor vehicle commissioner in procuring necessary motor vehicle license tags.

August 7, 1952—052-245.

AMPUTEE VETERANS OF WORLD WAR II—FREE MOTOR VEHICLE LICENSE

QUESTION: Are the benefits provided in §320.084, F.S., limited to World War II veterans?

To: *Honorable A. Morley Darby, State Representative, Escambia County, Pensacola, Florida:*

Subsequent to the passage of §320.084, F.S., Congress, on October 20th, 1951, amended the organic provisions of the veterans assistance law to include, in addition to those then entitled to Federal assistance (and hence those veterans contemplated by §320.084, F.S.), the following:

"For each veteran of World War II or of service on or after June 27th, 1950, and prior to the termination of

the present police action, who is entitled to compensation under the laws administered by the Veteran's Administration for any of the following due to disability incurred in or aggravated by active military, naval or air service of the United States during either of such periods. (a) Loss of or permanent loss of use of one or both feet; (b) or one or both hands; (c) permanent impaired vision of both eyes of the following status: Central visual acuity of 20/200 or less in the better eye with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the periphery field has contracted to such an extent that the widest diameter of visual field subtends an angle not greater than 20 degrees in the better eye." (Public Law #187, 82nd Congress) (Emphasis supplied)

It is pertinent that Congress felt it was necessary to amend the Federal Law so as to include the veteran "of service on or after June 27th, 1950." This would seem to indicate that Congress intended that "service on or after June 27th, 1950" could not be equivalent to "veteran of World War II."

The language of §320.084, F.S., that the benefits of the section are extended to "world war II veterans who suffered loss . . . of one or both legs . . .," apparently effectively negatives any intent on the part of the legislature to extend the free license plate provided by §320.084, F.S., to any veteran of service other than in "world war II" and for the disability enumerated in the statute. This interpretation is aided by the fact that the date of the Federal amendatory (October 20, 1951) is subsequent to the effective date of §320.084, F.S. In point of fact, two of the classifications of disability now entitled to financial assistance under Federal laws were not so provided for at the time §320.084, F.S., became law.

I am sympathetic to the meritorious claim of the veterans contemplated by Public Law #187. I am certain that the legislature will desire to extend to all Florida veterans now contemplated by the present Federal law the benefits of §320.084, F.S. I do not feel, however, that I should assume legislative prerogatives and read into the law provisions that do not exist.

It is my opinion that the benefit provisions of §320.084, F.S., are presently limited to World War II veterans with the type of disability enumerated in that statute.

Your question is therefore answered in the affirmative.

October 16, 1951—051-365.

MOTOR VEHICLES—LICENSE PLATES—ISSUANCE TO AMPUTEE VETERANS

QUESTION: Is the privilege granted by the provisions of Ch. 26839, Laws of 1951, §320.084, to a disabled veteran of exemption from the payment of a motor vehicle license tag fee, upon proof that the motor vehicle was acquired through financial assistance of the Federal Veterans' Administration, limited to a free license plate for the specific vehicle in the acquisition of which financial assistance was rendered, or does it extend to replacement vehicles acquired by the veteran without such financial assistance?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

The Act of Congress authorizing an appropriation and the expenditure of funds to provide, or assist in providing, an automobile by the payment of an amount not to exceed \$1600.00, including equipment with special attachments and devices, to veterans of World War II who are entitled to compensation for the loss of one or both legs at or above the ankle, specifically provides that no part of the appropriation shall be used for the purpose of repair, maintenance or replacement of such automobile; and further that no veteran shall be entitled to receive more than one automobile. The act further provides that any veteran making application for such automobile must show that he will be licensed to operate such automobile by the state of his residence.

Chapter 26839 (§320.084, F.S.) was enacted by the Legislature of 1951 with the apparent intent to meet the conditions in the Federal Statute, and was limited in its application to the provisions and conditions of the Federal Act.

A study of the Federal Statute impels the conclusion that it was designed to offer temporary relief to amputee veterans by providing them with a means of transportation during the period of their rehabilitation, by furnishing an automobile so equipped with special attachments as to accommodate the physical condition of the veteran to the operation of the vehicle.

Since the State Statute accepts all of the provisions of the Federal Statute, including the legislative intent, and prohibits the transfer of the free license plate issued for vehicles acquired under the terms of the Federal Statute, your question whether the free license plate issued under the State Statute is limited to the specific vehicle acquired by a veteran under the provisions of the Federal Statute is accordingly answered in the affirmative.

HIGHWAY PATROL

March 26, 1952—052-107.

DEPARTMENT PUBLIC SAFETY—AMERICAN AUTOMOBILE ASSOCIATION MEMBERSHIP CARD—TRAFFIC VIOLATORS—COURT APPEARANCE

QUESTION: Under Ch. 321, F.S., may the Department of Public Safety accept a valid American Automobile Association membership card as a recognizance for appearance in court for minor traffic violations (in no instance shall the violation be greater than where a bond would be more than \$200 and not to cover drunken driving): provided a cash deposit of \$2,500 has been deposited with the Director of the Department of Public Safety to guarantee the redemption of such American Automobile Association Card?

To: Colonel H. N. Kirkman, Director, Department Public Safety:

Please be advised that I find nothing in our law which would authorize the procedure suggested in your question, and accordingly the question must be answered in the negative.

However, for your information, reference is here made to Ch. 26897, Laws of 1951, providing a new and additional method of mak-

ing bail not to exceed \$200 in cases involving violations of Motor Vehicle Laws and Municipal Ordinances regulating motor vehicle traffic, except where the defendant is charged with driving while intoxicated or with a felony.

The Chapter above referred to provides that surety companies which are qualified to do business in the State of Florida may qualify to become surety in an amount not to exceed \$200, with respect to Guarantee Arrest Bond Certificates issued by an automobile club or association, such qualification to be by filing with the Insurance Commissioner, an undertaking thus to become surety.

Attached hereto you will find a copy of two of my recent opinions (051-349 and 051-420) setting forth the required type of "undertaking" necessary for execution by a surety company in order to make effective Guarantee Arrest Bond Certificates issued by automobile clubs or associations to its members, as contemplated by said Ch. 26897, Laws of 1951. Also attached hereto you will find a copy of our letter of January 3, 1952, naming the surety companies which have heretofore complied with said Chapter.

April 15, 1952—052-125.

HIGHWAY PATROLMEN—CONTRABAND—"MOONSHINE WHISKEY"—SEIZURE

QUESTION: Does a Florida highway patrolman, while engaged in the discharge of his official duties, have authority to detain and hold in custody for other law enforcement agencies a person or persons, and vehicle involved, found by such highway patrolman transporting moonshine liquor on the highways?

To: Colonel H. N. Kirkman, Director, Department of Public Safety:

For the purpose of this opinion, we must assume that the words "other law enforcement agencies" mean, and are limited to, law enforcement agencies of the State of Florida.

The duties, functions and powers of highway patrolmen are enumerated in §321.05, F.S., and include, among others, the power "to investigate reported thefts of vehicles and to seize contraband or stolen property on or being transported on the highways," (§321.05 (1),) and also, *when requested by the sheriff of a county*, to arrest with or without a warrant, "when the person to be arrested has or is believed to have committed a felony in connection with a traffic accident or the use of a vehicle on the highway." (§321.05 (3) (a))

At this point, we interpolate that by the provisions of §562.32, F.S., it is made a felony to remove a beverage for or in respect of which a tax is imposed by the beverage law or *would be imposed if such beverage were manufactured in or brought into this state in accordance with the regulatory provisions of the beverage law*, with the intent to defraud the state of such tax. Section 562.32, F.S., provides that the presence in a conveyance of any beverage upon which a tax is imposed by the beverage law or would be imposed if the beverage were manufactured in or brought into this state in accordance with the regulatory provisions of the beverage law, and upon which the tax has not been paid, shall be prima facie evidence that the beverage is being removed with the intent to defraud the

state of the tax. Section 562.37, F.S., provides that the absence of a Florida excise stamp on the immediate container is *prima facie* evidence that the tax has not been paid.

Section 901.21 (2), F.S., provides:

"(2) When any sheriff, deputy sheriff, or other police officer of this state, shall lawfully arrest any person for the violation of the road or speed laws, or for reckless driving, or driving while drunk or intoxicated, and shall find upon making such arrest that such person has unlawfully in his possession or control, concealed weapons, intoxicating liquors or stolen or embezzled property, contrary to law, it shall be deemed to be a violation of the law committed in the presence of the officer so making the arrest . . ."

It should be remembered that the right and authority of any police officer to stop and search, without a search warrant, any vehicle for contraband or illegal, intoxicating liquors or merchandise is limited and prescribed by the decision of the Supreme Court of the United States in the case of *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790, which opinion has been adopted by the legislature of Florida as the statutory law on the subject. (§933.19, F.S.). The gist of the opinion may be concisely stated that such a stopping and searching is lawful if the officer has knowledge of facts and information which would give a reasonable man probable cause for believing that the vehicle to be stopped and searched is transporting illegal, intoxicating liquors or other contraband.

"Contraband" is generally defined as against law or treaty, and goods or articles the importation or exportation of which is prohibited by law. *Black, Law Dictionary*. And the term "Contraband" has been held to include a malt mill, an illicit still and moonshine liquor. See *State v. Keeler*, 205 Wis. 175, 236 N.W. 561; *State v. McGee*, 55 S. C. 247, 33 S. E. 353. Articles of "contraband" are things outlawed and subject to forfeiture and destruction upon seizure. *People v. Balsky*, 29 N.Y.S. 2d. 535, 536, 177 Misc. 125.

Section 562.451, F.S., makes unlawful the possession of "any beverage commonly known as moonshine whiskey" and §§562.33 and 562.34 provide for the seizure and forfeiture of "all the casts, vessels, cases, or other packages whatsoever," containing any beverage on which any tax would be imposed if it had been manufactured or imported according to law.

Under the above cited section there is no doubt that "moonshine" is contraband within the meaning of §321.05 (1), which the highway patrol is under a duty to seize, when the said "moonshine" is discovered incident to a lawful investigation or arrest while performing any of their duties and functions.

It should be carefully noted that the duty to seize contraband found in the course of a lawful investigation or arrest for a violation of laws the Florida Highway Patrol is designed to enforce is not a mandate to stop and inspect one who is lawfully traveling on the highway, or parked on it, on nothing more than the bare chance or suspicion that the vehicle may contain some article of contraband.

It is my opinion that the question should be answered in the affirmative, provided the particular occasion falls clearly within the scope of one of the above enumerated provisions of law.

May 23, 1952—052-162.

HIGHWAY PATROL—TRAFFIC ON PUBLIC HIGHWAYS— ENFORCEMENT JURISDICTION

QUESTIONS: 1. Does the Florida Highway Patrol have the authority to investigate accidents that happen on a county designated and maintained road that has not been designated as a state highway?

2. Will the answer to the above question apply equally to counties that have a county highway patrol and a county that does not have a county highway patrol?

To: Col. H. N. Kirkman, Director, Department of Public Safety:

The distinction between state and county highways has been eliminated for all practical purposes by §341.81, F.S. However, aside from §341.81, the provisions of §321.05 gives the Florida Highway Patrol broad traffic enforcement jurisdiction over "public highways" which for all practical purposes covers nearly all public ways for vehicular travel.

It follows that your questions are answered in the affirmative.

May 30, 1952—052-168.

DEPARTMENT PUBLIC SAFETY—PENSION FUND— DECEASED MEMBER—WIDOW'S BENEFITS

QUESTION: If a member of the uniform division of the Department of Public Safety dies of natural causes, or by any means not incurred in line of duty, is this department authorized to pay to the widow, or estate, ninety per cent of all contributions made to the Pension Fund?

To: Honorable H. N. Kirkman, Director, Department of Public Safety:

It is generally held that a pension granted by a public authority, even when the pensioner has made compulsory contributions, does not give a vested contractual right in the pension or the fund. See annotation 54 A.L.R. 943, and 98 A.L.R. 501.

In *Plunkett v. Board of Pension Comrs.* (1934) 113 N.J.L. 230, 173 A. 923; affirmed in (1935) 114 N.J.L. 273, 176 A. 241, the Court said:

"The rule is that compulsory deductions from the salaries of governmental employees, by the authority of the government, for the creation of a pension fund, creates no contractual or vested right between such employees and the government; and neither the employees, nor those claiming under them have any rights except such as are conferred by the statutes creating and governing the fund. And the contributions made by the applicant here were not voluntary in the legal sense. *Bennett v. Lee*, 104 N.J.

Law 453, 142 A 362. Until the particular event should happen upon which the money, or part of it, was to be paid, there was no vested right in the member to such payment. *Pennie v. Reis*, 132 U.S. 464. 10 S. Ct. 149, 33 L. Ed. 426."

To this same effect are *Bader v. Crone*, 116 N.J.L. 329, 184 A. 346, *Salley v. Firemen's and Policemen's Fund Commission*, 124 N.J.L. 79, 11A. (2d) 244.

It is apparent from the foregoing authorities that the statute authorizing the pension and creating the fund entirely prescribes the rights of a contributtee therein.

A careful reading of §§321.17 and 321.21, F. S., reveals no statutory right vesting in an employee or his estate who dies of natural causes to a ninety per centum return of his contributions. This conclusion is strengthened by the express provision of §321.21, that:

"Whenever . . . member . . . dies, from injuries, disease, or illness, *contracted by reason of his occupation as a member of the Department of Public Safety* . . . the widow, if living, or the children shall be entitled to all moneys paid into the pension fund by the deceased, less ten per centum . . ." (emphasis supplied)

And, "As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing . . . So also, if the statute directs that certain acts shall be done in a specified manner, or by a certain person, their performance in any other manner than that specified, or by any other person than one of those named, is impliedly prohibited." See *Crawford*, *Statutory Construction* (1940), §195.

State ex rel, Welch v. Gay, 41 So. 2d. 893, involved a statute authorizing an employee leaving the employ of the state *before* serving ten years, but before being eligible to retire, to obtain a refund of all contributions the employee had made to the retirement fund, or to leave contributions in fund and retire at age of sixty if the employee had served at least ten years.

In holding that such a statute granted no "clear legal right" or "no authority to the Comptroller to refund" to an employee who left the employment *after* serving more than ten years the court said:

*** "We do not find authority given by the legislature to the Comptroller to refund any moneys except to persons who have been in the service of the state for less than ten years. *The situation under such an interpretation is probably not one that was intended to be created, but it is not our province to rewrite a law, imperfect though it may be. To repeat, it grants no authority to the comptroller to refund moneys to one in the relator's position, and therefore it cannot be said that she has shown a clear legal right to coerce that officer.*" (Emphasis supplied)

Your question is, therefore, answered in the negative.

June 28, 1951—051-183.

FLORIDA HIGHWAY PATROL—MOTOR VEHICLE
ACCIDENTS—DUTIES—RESPONSIBILITIES

QUESTION: What are the duties and responsibilities of the Florida Highway Patrol with regard to motor vehicle accidents which occur on driveways, streets or roads which are used by the public but which are privately owned or controlled, such as entrances to drive-in theaters, motor courts, drive-in restaurants, attractions such as Wakulla Springs and similar places?

To: Honorable H. N. Kirkman, Director, Department of Public Safety:

The department of public safety which includes the Florida highway patrol was created by Ch. 321, F. S. This chapter sets forth the duties and responsibilities of said department. Generally speaking, the authority of the state highway patrol is limited to its duties pertaining to the regulation of traffic and to enforcing traffic laws on the state highways of Florida (§321.05 (11), F.S.).

Section 321.14, F. S., however, provides that "This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety."

In creating the state highway patrol, I believe that the legislature intended to provide an effective agency which could meet an apparent need in policing areas of public roads which because of their location outside of the jurisdiction of municipal police or because of the lack of facilities of other law enforcement officers such as sheriffs, could not be properly regulated in the absence of a policing organization specifically designed to cope with traffic problems which is statewide in its scope.

Although, as stated above, it is evident that the legislature did not intend to create a new law enforcement agency which would duplicate the activities and responsibilities of other law enforcement agencies and therefore restricted the authority of highway patrol officers generally to state highways, I do not believe that the legislature intended this restriction to be so closely or literally defined as to impede the patrol in carrying out the duties which have been delegated to it by law.

With the advent and growth in popularity of such innovations as drive-in theaters, new problems in traffic regulation have been created which clearly could not have been foreseen by the legislature at the time Ch. 321, F. S., was enacted.

A majority of the establishments contemplated in your question are located outside the boundaries of municipalities and consequently are not subject to regulation by municipal law enforcement officers. They do come within the jurisdiction of the county sheriff's office and problems of ordinary law enforcement arising in such places would obviously be the sheriff's responsibility. The problems of traffic regulation, however, present a specialized branch of law enforcement work on such a large scale that many county law enforcement agencies have neither the personnel or facilities to cope with such problems.

This fact has been recognized in a number of counties by the creation of county highway patrol officers either by authority of special legislative acts or under the general law. In counties maintaining a highway patrol it would appear that no real problem is presented since the regulation of traffic and enforcement of traffic laws on private roads customarily used by the public would be carried out by the county highway patrol.

Many counties, however, do not at present maintain a county highway patrol. In such counties, the enforcement problem on the roads described in your question may be acute. In many instances there is a greater concentration of vehicles and therefore a greater degree of traffic hazard existing on the paved highways open to the public but privately owned than on highways owned by the state.

I believe, therefore, that if the state highway patrol is to successfully carry out the responsibility placed upon it, a strict literal interpretation of Ch. 321 should not be so closely followed as to defeat the clear intention of the legislature in creating the highway patrol.

Various other provisions of the statutes when considered with Ch. 321 indicate that the authority and duty of state highway patrolmen cannot rigidly be restricted to the right-of-way limits of state highways under all circumstances, regardless of the particular facts involved.

Section 317.04 (1) (b), for example, provides that the provisions of §§317.07-317.21 (which relate to the duties of persons involved in accidents, reports and investigations by highway patrolmen) shall apply upon highways *and elsewhere* throughout the state.

Section 317.01 defines street or highway: "The entire width between the boundary of every way or place of *whatever nature when any part thereof* is open to the use of the public for purposes of vehicular traffic." (Emphasis supplied.)

A consideration of the Florida Financial Responsibility Act (Ch. 324, F. S.) also indicates the intent of the legislature to be that when necessary or called upon on to do so, state highway patrolmen shall investigate motor vehicle accidents resulting in bodily injury or death to any person or in property damages of \$50.00 or more. This act (§324.04, F. S.) does not limit the responsibility of highway patrolmen to state highways but uses the broad language "any accident."

In view of the above generalizations and subject to the observations contained therein, I believe your question is best answered as follows:

State highway patrolmen may properly be called upon to investigate and report motor vehicle accidents occurring on roads which although privately owned are commonly used by the public. Such officers may also take such precautionary measures as may be necessary to regulate traffic entering or leaving private roads within the meaning of those under discussion, in order to prevent traffic hazards or traffic law violations on state highways connect-

ing with such private roads, even though it may be necessary for the patrolman to leave the state highway and enter into the privately owned but publicly used roadway in order to accomplish this purpose.

August 27, 1951—051-287.

DEPARTMENT PUBLIC SAFETY—HIGHWAY PATROLMEN—NON-MILITARY LEAVES OF ABSENCE

QUESTION: May the Department of Public Safety grant leaves of absence to its highway patrolmen, for non-military purposes, to permit them to make, or aid in the making of, municipal traffic surveys as employees of a municipality making such surveys?

To: Department of Public Safety, Martin Building, C I T Y:

Section 321.17, F. S., as amended, provides for military leaves of absence to highway patrolmen; however, we find nothing in the statutes providing for non-military leaves of absence for such patrolmen. Although there is nothing in the statutes providing for non-military leaves of absence of highway patrolmen, likewise there is nothing in said statutes expressly prohibiting such leaves of absence.

The Department of Public Safety is under the control of an executive board consisting of members of the State Cabinet (§321.01, F. S.). The Department, through its Director, is required to set up and promulgate rules and regulations by which the personnel of the Division of the Florida Highway Patrol shall be examined, employed, trained, located, suspended, reduced in rank, discharged, recruited, etc. (§321.02, F. S.) and may also set up rules and regulations establishing a civil service to govern the employment and tenure of members of the highway patrol (§321.06, F. S.). We are not advised whether or not civil service rules and regulations have been set up pursuant to this section of the statutes, and if so whether or not there is any regulation as to leave of absence for highway patrolmen.

I do not think that a patrol officer is such an officer as comes within the purview of §17, Art. XVIII of the Constitution requiring that he devote his personal attention to his duties during the term of office. I do not think that a patrol officer is an officer within the purview of this section. We know of no constitutional or statutory prohibitions against the Department of Public Safety granting to patrol officers leave of absence; however, we do not believe that any leave of absence should be granted extending beyond the term of office of the present members of the Cabinet making up the Department, in the absence of some statute so providing or some rule and regulation having the force of a statute.

We do not think that the period of time under which a highway patrolman is on leave of absence should be granted in calculating the time served by him for purpose of retirement under §§321.15 et seq., F. S. However, if he should be classified and employed by a municipality as a law enforcement officer he would be entitled to fifty per centum of the time served as a law enforce-

ment officer for such city. (§321.19, F. S.). We do not herein attempt to pass upon the question of the effect of such a leave of absence in computing additional compensation or seniority rights.

These authorities and observations appear to answer the above questions in the affirmative, subject to the limitations above mentioned.

DRIVER'S LICENSES

November 28, 1952—052-318.

DRIVER'S LICENSES—EXEMPTIONS—OPERATORS GROVE WATER TANK TRUCKS

QUESTION: Is a water tank truck owned by a local caretaking water concern hauling water from a water stand pipe to young citrus trees in various groves and used only upon the highways when going to and from the stand pipe and to and from a garage location early in the morning and late at night an "implement of husbandry" within the exemption provisions of §322.04 (2), F. S.?

To: Honorable Howard G. Livingston, County Judge, Highlands County, Sebring, Florida:

Section 322.04 (2), F. S., makes an exemption to the driver's license law as follows:

"Any person while driving or operating any road machine, farm tractor, or *implement of husbandry temporarily operated or moved on a highway.*" (Emphasis supplied)

I know of no Florida court decision which provides a specific answer to your problem. The Texas supreme court, however, considered a similar factual situation in the case of *Allred vs. J. C. Engelman, Inc.*, 61 S.W. 2d 75, 123 Tex. 205, 91 A.L.R. 417. In that case it was held that a corporation's trucks used in hauling water to citrus trees on land owned by others, who contracted with the corporation for irrigation of orchards were "implements of husbandry" within a statutory exemption from a registration tax.

It should be noted that in this case the court was concerned with a tax statute and not with a regulatory measure designated to protect the safety of the public, a factor which is involved in the Florida statute we must consider.

Apparently the Florida legislature has sought to make a distinction in so far as the driver's license law is concerned, between operators of vehicles designed for use on public roads and operators of farm machinery clearly designed for use in fields, citrus groves, pasture lands or other places where the safety of the traveling public is not affected. This latter distinction (and exemption) is intended to apply even though the farm machinery such as tractors, bulldozers, etc., may occasionally be forced to use a public road in being moved from one location to another.

I am inclined to think that no general answer could be given to your question which could be used as a rule to follow in all cases. Each case involving an exemption to the driver's license law

on the grounds that the operator was operating an implement of husbandry as distinguished from a motor vehicle, would of necessity have to be considered in the light of the specific factual circumstances involved.

I feel that it is appropriate to point out, however, that since the driver's license law is intended to regulate motor vehicle traffic for the purpose of insuring the safety of the public, a reasonably strict construction should be placed upon the exemptions provided in the statute.

Under the specific facts recited in your inquiry, it would appear that the tank truck in question is similar to any other truck except that it is used exclusively for the purpose of hauling water. It also appears that in traveling to and from citrus groves it is used to a very considerable extent on public roads and would therefore constitute as much of a traffic hazard as trucks used for other purposes. It is my opinion that in this instance the exemption would not be applicable. Subject to the above discussion, your question is answered in the negative.

AUTO TRANSPORTATION COMPANIES

July 10, 1951—051-206.

MOTOR VEHICLES—TRANSPORTATION—RECIPROCAL AGREEMENTS—MILEAGE TAX

QUESTION: Where a Florida partnership engaged in the transportation of milk, cream, etc., has established an office in the State of Tennessee from which office cream, milk, etc., is transported in interstate commerce to customers in the state of Florida, are such motor vehicles subject to a mileage tax in this state in the light of the reciprocal agreement entered into between the states of Florida and Tennessee on September 4, 1943?

To: *Honorable C. M. Gay, State Comptroller:*

The state of Florida, through its proper officers, on September 4, 1943, pursuant to §320.39, F. S., entered into a reciprocal agreement with the state of Tennessee wherein and whereby it was agreed, among other things, "that each State will recognize and permit the operation in that State of commercial or private motor vehicles in an interstate, for hire or private capacity, when owned and properly registered in the other State, without requiring the payment of any mileage tax or registration fee."

There is no provision in this said agreement for the establishing of an agency or "place of business" on the part of a Florida concern in the other state, or vice versa.

Section 320.39, F. S., provides, in part, that reciprocal agreements may be entered into with other states, "whereby residents of such other states operating motor vehicles properly licensed and registered in their respective states, may have such privileges and exemptions in the operation of their said motor vehicles, in this state, as residents of this state may have and enjoy in the operation of motor vehicles duly licensed and registered in this state, in such other states."

It is not made to appear from the application for a refund of mileage taxes already paid to the state of Florida under the provisions of §323.15, F. S., that the said motor vehicles are both registered and *owned* in the state of Tennessee. In fact, there is information available to me that the partnership which owns said motor vehicles is a Florida partnership with all members thereof residing in the state of Florida and therefore are not *residents* of the state of Tennessee; that the situs and home operating base of the partnership is Jacksonville, Florida, and therefore I am of the opinion that the said motor vehicles are subject to the mileage tax under the provisions of §323.15, F. S., and the aforesaid reciprocal agreement.

August 28, 1951—051-288.

AUTO TRANSPORTATION COMPANY—LIABILITY

QUESTION: In view of certain provisions of §323.15, F. S., as amended by Ch. 26663, Laws of 1951, are auto transportation companies holding certificate or permit under Ch. 323, F. S., and which pay the mileage tax prescribed by said amended §323.15, exempt from payment of the filing fees or tax fixed by §610.08, F. S.?

To: Honorable R. A. Gray, Secretary of State:

Chapter 323, F. S., regulates the operation of auto transportation companies in this state. Amended §323.15 requires such a company which has been granted a certificate of public convenience and necessity, or a permit, as contemplated by Ch. 323, to pay to the Comptroller the mileage tax set forth in said amended section. A part of said amended section is quoted as follows:

"The mileage tax provided for in this Section shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipal, including excise and license taxes levied or imposed against such auto transportation companies, or the operation of such business and facilities thereof, or their property, except ad valorem taxes levied upon the property other than motor vehicles of such auto transportation companies, and except gasoline tax and motor vehicle fuel tax, and except the motor vehicle license tax now or hereafter provided for by law."

Section 610.08, F. S., requires the payment by corporations, except those exempted in §610.09, F. S., of an annual capital stock tax, or, as expressed in §610.08, "a filing fee or tax." Such fee or tax is an excise tax contemplated by the quoted part of amended §323.15.

In view of the foregoing, in my opinion the question is answered as follows:

An auto transportation company to which has been issued a certificate of public convenience and necessity, or permit, as contemplated by and under the provisions of amended §323.15, F. S., is exempt from paying the filing fee or tax (Capital Stock Tax) required by §610.08, F. S.

FINANCIAL RESPONSIBILITY

April 22, 1952—052-130.

FINANCIAL RESPONSIBILITY LAW—OPERATORS' LICENSES—SUSPENSION

QUESTION: What is the interpretation of the Financial Responsibility Law authorizing me as Commissioner to suspend the licenses of operators of motor vehicles involved in an accident?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Section 324.04 (2) authorizes the Commissioner at the expiration of thirty days from the date of his receipt of notice of an accident involving a motor vehicle to suspend the licenses of the operators of the vehicles involved unless within that period of time the operators shall be found by the Commissioner to be exempt from the terms of the statute, based upon evidence in his files satisfactory to him that one or more of several grounds for exemption exists.

Applying the established rules of statutory construction to the subject Section, in the light of the language used, a reasonable interpretation of the statute is that it was the legislative intent to withhold the suspension of the operators' licenses for a period of thirty days to enable the operators involved to submit to the Commissioner proofs of one or more of the grounds of exemption granted by the statute. It would constitute a strained construction of the Act to interpret it to mean that the authority to suspend the operators' licenses terminates on the last day of the period allowed for the presentation of proof to the Commissioner that a ground of exemption exists.

It is my conclusion that the statute does not by its terms limit the time after receipt of notice of an accident within which the Commissioner is authorized to exercise his authority to suspend the operators' licenses, but that the period within which the authority may be exercised is a reasonable time after the Commissioner has reached his decision that under the facts presented to him the operators involved in the accident are subject to his authority to so suspend. The thirty days prescribed must be construed to be a limitation of time within which the Commissioner may not exercise the authority to suspend rather than a limitation of time within which he must act.

October 9, 1952—052-290.

JUVENILES—AUTOMOBILE ACCIDENTS—FINANCIAL RESPONSIBILITY

QUESTIONS: 1. Should police officers report automobile accidents to this department, as provided in §324.04, F. S., in those instances where a juvenile is involved in the accident as a driver of one or both of the automobiles?

2. Does any law relating to juveniles prevent this department from carrying out all the provisions of Ch. 324, F. S., including the penalty of suspending the driver's license of a juvenile?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The purpose of Ch. 324, F. S. is reflected in its title, "Financial Responsibility", and detailed in §324.001. It is sufficient here to remark that the purpose of the law is to promote safety and provide financial security by operators of motor vehicles on the public streets and highways of this state, whose responsibility it is declared to be to recompense others for injury to person or property caused by the operation of such a motor vehicle. The administration of this regulatory law is charged to the Insurance Commissioner (§324.03). In the event the operator of a motor vehicle is involved in an accident, as contemplated by the law, he is required to evidence that he is able to answer in damages to the extent and according to the procedure prescribed by the law. The enforcement features of the law consist of: (1) suspension of an operator's license to operate a motor vehicle in this state; and (2) certain criminal penalties in the event such an operator is found guilty of an act constituting a misdemeanor, as provided in §324.17.

Section 324.04 requires that, "The director of the department of public safety, any sheriff, police department and/or peace officer of this state", shall, within ten days after an accident, within the purview of this law, report same in writing to the Insurance Commissioner, the report to include the matters required by said section.

The jurisdiction of juvenile courts in relation to dependent and delinquent children is established and defined by Ch. 39, F.S. In addition to the comprehensive provisions of such chapter concerning this matter of jurisdiction, it is provided, in effect, in §39.02 (7) that nothing in such chapter shall be deemed to take away from juvenile courts any jurisdiction or duties conferred by §§232.19, 391.07, 409.03, 416.03, 416.06, 416.07, 416.08 and 417.03, F. S., or be deemed to take away from the juvenile courts heretofore established in the mentioned counties "any additional juvenile court or domestic relations jurisdiction" under the described laws, to wit: As to Broward, Ch. 22709, Laws 1945, as amended; as to Dade, Ch. 19597, Laws 1939, as amended; as to Pinellas, Ch. 11972, Laws 1927; and as to Polk, House Bill No. 1234, passed at the 1951 session (Ch. 27318, Laws 1951).

It is not necessary here to labor the psychological factor and humane motives which have resulted in these mentioned laws granting jurisdiction of dependent and delinquent children to juvenile courts in this state. For a complete statement of such purpose, see §39.20, F. S.

The laws mentioned above which define and prescribe the jurisdiction of these juvenile courts have been considered. There appears to be nothing in these laws constituting an impediment to the full application of the regulatory features, as distinguished from criminal features, of Ch. 329 impartially as to juveniles and adults.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) Police officers should report automobile accidents in this state, within the purview of Ch. 324, as provided in §324.04, in

those instances where a person involved in such an accident as a driver of either of the automobiles falls within the age group set forth in these juvenile court laws as applicable to dependent or delinquent children.

(2) None of these laws relating to dependent and delinquent children and the jurisdiction of juvenile courts with respect thereto, is an impediment to the Insurance Commissioners and other designated public officers carrying out all the regulatory provisions of Ch. 324, including the penalty of suspending the driver's license of a person falling within the age group of dependent or delinquent children as above mentioned. As noted above, §324.17 prescribes criminal penalties for persons found guilty of violating any of the several misdemeanors described in said section. If, in the administration of Ch. 324, the question should arise as to whether a person falling within the age group of dependent or delinquent children, as described, is guilty of any of the several misdemeanors mentioned, such question lies within the exclusive jurisdiction of the proper juvenile court.

November 24, 1952—052-317.

DRIVER'S LICENSE—FAILURE TO VOLUNTARILY RETURN TO INSURANCE COMMISSIONER

QUESTION: 1. Do the provisions of §324.17 (2), F. S., apply as a penalty to §324.16, F. S., or is the provision that the cost of such action shall be borne by the person as outlined in §324.16, F. S., considered a penalty for the offense of failing to return the license voluntarily?

2. What powers does the Florida Highway Patrol have to make an arrest under §324.16, F. S., for failure to return a driver's license to the Commissioner?

To: *Honorable T. Harold Williams, County Solicitor, Palm Beach County, West Palm Beach, Florida:*

Section 324.16, F. S., provides:

"Return of License or registration to commissioner.—Any person whose license shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this chapter, shall have been cancelled or terminated, or who shall neglect to furnish other proof upon the request of the commissioner shall immediately return his license to the commissioner. If any person shall fail to return to the commissioner the license as provided herein, the commissioner shall forthwith direct any peace officer of this state to secure possession thereof and to return the same to the commissioner, and the cost of such action shall be borne by such person." (Emphasis supplied)

Section 324.17, F. S., provides:

"Penalties.—(1) Any person who shall make any misstatement in or commit any forgery upon notice required to be filed hereunder shall be fined not more than

five hundred dollars or imprisoned for not more than six months or both.

(2) Any person who shall violate any provisions of this chapter *for which no penalty is otherwise provided* shall be fined not more than five hundred dollars or imprisoned for not more than ninety days or both." (Emphasis supplied)

I have found no judicial decisions that clearly answer the question you have asked. 23 Am. Jur. at page 622-623, defines the nature of "penalties" quite broadly as follows:

"§27. Definition and Nature.—The words 'penal' and 'penalty' have many different shades of meaning. In the municipal law of England and America, they have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *The term 'penalty' is used very loosely in some statutes, and might, without much strain of its meaning, be held to embrace all the consequences visited by law upon the heads of those who violate police regulations.* As it is sometimes stated, a penalty is in the nature of a punishment for the nonperformance of an act or for the performance of an unlawful act and in the former case stands in lieu of the act to be performed. The character of a penalty is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution.

....

"The term 'penalty,' when employed without any qualification, express or implied, is calculated to mislead, because it is capable of being construed so as to extend to all penalties, whether exigible by the state in the interest of the community or by private persons in their own interest. *Frequently, however, the word has been restricted in its meaning and held to apply only to a sum of money of which the law exacts the payment by way of punishment for doing some act which is prohibited or for omitting to do some act which is required to be done . . .*" (Emphasis supplied).

In AGO No. 049-405, in outlining the procedure that should be followed under §324.16, F. S., and the nature of the liability incurred when a person fails to return his driver's license when required by that section, I said:

"A peace officer so directed by the Insurance Commissioner to secure possession of such a license, would not legally be authorized by virtue of such direction to search the person, house, paper and effects of a person refusing to deliver such license and to seize the same from such person, who refuses to submit to such search and seizure (Section 22, Declaration of Rights, Florida Constitution). Since such a direction by the Insurance Commissioner cannot be considered a writ or process of a court, there appears to be nothing in the various statutes fixing fees for the

services of a peace officer thus involved. The wording, *'the cost of such action shall be borne by such person,'* reasonably is to be construed as creating a civil obligation or account, collectible as any other account, for the actual expenses of a peace officer executing or attempting to execute such a direction of the Insurance Commissioner.

"It is to be noted that the failure of a person to deliver his driver's license voluntarily to the Insurance Commissioner under the circumstances contemplated by the first question, may subject him to the risk of prosecution under Section 16 of the act. Such a person, however, could not be prosecuted for failure to pay the costs provided in Section 15 and dealt with in the second question". (Emphasis supplied)

It is my opinion, therefore, that the failure of a person to deliver his driver's license voluntarily to the Commissioner which may subject him to a civil liability for the cost of a peace officer's actual expenses incurred in executing or attempting to execute a direction of the Commissioner pursuant to the provisions of §324.16, F.S., is not intended to be a "penalty" within the meaning of §324.17, F.S., which would bar prosecution under subsection (2) of that section. I think this answers your first question.

For the purpose of your second question, I assume that the phrase "any peace officer of this state" as used in §324.16, F.S., includes patrol officers who are "... declared to be conservators of the peace ... and in the performance of any of the powers, duties and functions authorized ... the highway patrol shall have the same protections and immunities afforded other peace officers ...". See §321.05, F.S.

Even under such a construction as I assume above however, a highway patrolman directed by the Insurance Commissioner to secure possession of a driver's license as contemplated by your question would have exhausted his legal right to proceed further to acquire possession of such license when he makes a demand upon such person for the voluntary return of his driver's license and is refused. This seems reasonable since such a direction by the Commissioner cannot be considered a writ or process of a court. A highway patrolman or other peace officer would not be legally authorized to search the person, house, papers and effects, arrest or seize anything from a person who refuses to submit to such search and seizure by simple virtue of any such direction of the Commissioner as is contemplated by §324.16, F.S. See §22, Declaration of Rights, Florida Constitution, and AGO No. 049-405.

This, I think, answers your second question.

CHAPTER XXIII AERONAUTICS

LICENSING AIRCRAFT AND PILOTS

September 20, 1951—051-323.

TAXATION—AIRCRAFT—REGISTRATION FEES— EXEMPTIONS

QUESTION: Where aircraft registration fees prescribed by Ch. 24045, Laws of 1947, (§§330.06 - 330.26, F. S.) are not paid, are aircraft, as defined in that law, subject to personal property taxes?

To: *Honorable Walter Keyes, Director, Florida State Improvement Commission:*

Chapter 24045, Laws of 1947, now contained in Ch. 330, F. S., provides for the registration of aircraft in this state as "motor vehicles," and places a license tax on such aircraft. The license fees prescribed by the act are specifically stated in §6 thereof (§330.11, F. S.) to be "in lieu of all state and municipal personal property taxes on aircraft," and §12 (§330.17, F. S.) provides as follows:

"Municipalities may not impose registration fees on aircraft. It shall be unlawful for any municipality of this state to collect any license or registration fee or tax on any aircraft or glider in this state."

It is also to be noted that the term "municipality" by virtue of the definitions contained in the law, means any county, city, town, village, borough, authority, district or other political subdivision or public corporation of the state.

From a reading of the above quoted provisions of the act, it seems clear that the Legislature intended that the registration fee upon aircraft would be in lieu of any other form of taxation. However, your question is primarily concerned with instances where the owners or operators of aircraft fail to pay the required registration fees, and you ask whether in such cases the levying of personal property taxes would be proper.

While it might be possible to construe the above quoted provisions of the act as not definitely prohibiting personal property taxes in cases where the registration fee is not paid, there is no need here to decide that particular question in view of the provisions of §1 (§330.06 (1), F. S.) of the law, which specifically defines "aircraft" as:

"any motor vehicle (as used in Section 13, Article IX of the Constitution of the State of Florida) now known or hereafter invented, used or designed for navigation of or flight in the air."

The Legislature, by so defining aircraft thereby placed air-

craft within the purview of that constitutional provision which specifically provides as follows:

"Motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles, which license tax shall be in such amount and levied for such purpose as the legislature may, by law, provide, and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property."

Since motor vehicles are by the constitution exempted from all personal property taxes, and since aircraft under Ch. 24045, Laws of 1947, are defined as motor vehicles, then any ad valorem personal property tax on such vehicle would be invalid, regardless of whether the registration fee had been paid or not (see *Nolan-Peeler Motors vs. Woods*, 128 Fla. 156, 175 So. 523). Your question is therefore answered in the negative.

In so holding, I am not expressing any opinion as to the validity of the Legislature's action in defining aircraft as motor vehicles within the purview of the constitution, since such corollary question could only be decided by the courts.

April 10, 1952—052-121.

TAXATION—AIRCRAFT—ASSESSMENT—LANDS— DOUBLE ASSESSMENT

QUESTIONS: 1. May aircraft be assessed in this State as tangible personal property under Ch. 200, F.S.?

2. Where a parcel of real property is assessed both as acreage and by lots, which is the legal assessment?

To: *Honorable Hugh C. Barco, County Tax Assessor, Inverness, Florida:*

Section 330.06, F.S., declares aircraft to be motor vehicles and within the purview of §13, Art. IX, of the State Constitution, and §330.11, F.S., assesses certain license taxes against such aircraft and declares that such license taxes "shall be in lieu of all state and municipal personal property taxes on aircraft." The foregoing term "municipal" as used in Ch. 300, F.S., includes counties (§330.06 (3), F.S.). These observations answer the first above question in the negative.

Where the same piece or parcel of land is placed on the tax books for any tax year both as acreage and by lots and blocks, such assessments are usually referred to as double assessments, only one of which is required to be paid. When the taxpayer pays either of such assessments the other is void and should be cancelled. Where there is a double assessment and taxes are paid in accordance with one of the said assessments, the other assessment will not support a tax sale and tax sale certificate; such a tax sale certificate would be void, and will not support a tax deed. These observations seem to answer your second question.

Where there is a double tax assessment and one of the assessments is paid, the tax collector, upon the discovery of the other or double assessment, should charge the unpaid one to his errors and insolvencies list.

CHAPTER XXIV

HIGHWAYS, BRIDGES AND FERRIES

STATE ROADS

May 9, 1952—052-151.

STATE ROAD DEPARTMENT—GASOLINE TAX FUNDS— TIRES — PURCHASES FOR COUNTY OWNED VEHICLES

QUESTION: Is the State Road Department authorized to purchase tires from funds derived from 80 per cent of the seventh cent gasoline tax and furnish said tires to a board of county commissioners for use on county owned vehicles to be used exclusively for the maintenance of state designated roads in the county requesting such assistance?

To: Honorable R. M. Hartsfield, Secretary, State Road Department:

In your explanation of the factual situation involved in this problem, you advise that the primary purpose of tire purchases made in this manner would be to allow county commissioners to acquire tires for their vehicles which are engaged in road building or maintenance work at the price which is allowed to the state by tire companies, thus effecting a savings to the counties of from 25 to 50 per cent.

You further advise that the plan as proposed for said tire purchases is purely voluntary on the part of the counties and would only operate for such counties as indicated a desire to avail themselves of the plan by appropriate resolution.

At the outset it should be noted that some counties (e.g. Dade) have special acts requiring all county purchases to be made by a purchasing agent through competitive bids (See Ch. 27072, Laws of 1951, and others). I do not believe that this fact is material to the question you have presented, however, since the tire purchases contemplated would be made by the state from state funds as distinguished from county purchases made from county funds. The purchases considered here, therefore, would be state purchases and not affected by local special acts of the legislature.

Since the plan you propose is new, the Florida Supreme Court has rendered no decision which would be helpful in seeking to reach a conclusion as to the legality of the program. We must rely entirely on the various statutory provisions providing for the funds in question and prescribing their use. We must consider said statutory provisions in *pari materia* along with the existing laws regulating the use of county funds and purposes in so far as road building or maintenance is concerned in an attempt to reach a logical answer as to the legislative intent in creating our county and state road systems.

Your attention is called to the fact that §341.81, F. S., designates "all public roads which are now in existence, are open to

travel by the public generally and are dedicated to the public use, according to law or by prescription, and which are constructed hereafter out of public funds . . . are hereby designated and declared to be and are established as state roads, forming parts of the state system of roads, and shall be entitled to all the rights and privileges of other state designated roads . . ."

It seems clear from a reading of the above statute that at least for the purpose now under discussion, all public roads whether county or state maintained are in a technical sense "state roads" and as such the State Road Department has a definite interest in their maintenance and would be authorized to expend its funds for that purpose.

Section 208.44, F. S., is too long to quote here in full. It provides for a seventh cent tax on gasoline which is the source of the funds herein considered. The entire section should be studied for the purpose of understanding the problem you present, but for the purpose of this opinion, I quote only the following excerpts from said section, since these paragraphs are of especial interest and directly material:

"Sec. 208.44 (3) . . . Eighty per cent to the state road department for the construction, reconstruction, maintenance and repair of state roads and bridges within such county, for the lease or purchase of bridges connecting state highways within such county, acquisition of rights of way for state roads within such county or for reduction of bonded indebtedness of such county or special road and bridge districts within such county incurred for road and bridge purposes. Provided, however, that the state road department shall expend such funds solely for such purposes or on such state roads as shall be designated by appropriate resolution of the board of county commissioners of such county; . . ."

Your attention is invited to the latter portion of said quotation which indicates that although the funds in question belong to the State Road Department, they may only be spent in such manner as shall be designated by the county in which said funds are to be used.

Section 208.44 (12) defines further the legislative intent in directing the use of said funds and providing in clear language for cooperation between the State Road Department and the various boards of county commissioners. It states, in part:

"And, the legislature has found and hereby declares that for the proper and efficient construction and maintenance of public highways designated state roads, it is in the best interest of the state *to further integrate the activities of the state road department and the several boards of county commissioners* as provided in subsection (3) in order that both state and local highways needs may be adequately provided for." (Emphasis supplied).

Section 208.44 (15), reads as follows:

"It is declared to be the legislative intent that the funds derived from this section shall be used in such man-

ner and for the purposes aforesaid, to reduce the burden of ad valorem taxes in the several counties."

In view of the above cited statutes and the clear intent on the part of the legislature to provide for a cooperative integrated program of road building and maintenance on the part of the state and counties, it is my opinion that the procedure for tire purchases and use, as outlined in your question, is sanctioned by our laws. The funds in question are state funds but their use is limited to the area of the particular county involved after their division and must be expended by the Road Department in accord with the wishes of the county. Since both the county and state are responsible for road maintenance it seems to me that the praiseworthy objective of effecting a savings in the purchase of tires to be used on county road working vehicles is fully justified under the applicable statute which we have considered.

It should be noted that technically the title to the tires purchased under this plan will remain in the state even though they are allocated to the counties for use on county owned vehicles. This being the case, I suggest that an adequate method of keeping an inventory of said tires be maintained by the Road Department and that proper safeguards be maintained to prevent the abuse of this method of tire purchase by either the counties or individual employees. Such can be accomplished by an appropriate resolution of the Department, accepted by resolution of the County Commissioners of the county prescribing the mechanics and regulations necessary to effectuate the said plan and provide safeguards.

Subject to the above observations and suggestions, your question is answered in the affirmative.

COUNTY ROADS AND BRIDGES

January 11, 1951—051-5.

COUNTY COMMISSIONERS—BRIDGES—FIRE INSURANCE

QUESTION: Is the Board of County Commissioners of Osceola County empowered to insure county bridges against the hazards of fire?

To: Honorable Lawrence Rogers, County Attorney, Osceola County, Kissimmee, Florida:

The Board of County Commissioners has ample authority under §§343.03, 343.09 and 343.25, F.S. to build and maintain bridges. It is firmly established that county commissioners have no powers other than those vested in them by statute or such as must be necessarily implied to put into effect powers expressly vested in them. (*Crandon vs. Hazlett*, 157 Fla. 574, 26 So. 2d 638; *Gessner vs. Del-Air Corporation*, 154 Fla. 829, 17 So. 2d. 522).

The power to maintain bridges implies the authority to protect the public's property against the perils of fire. If it is the well considered opinion of the Board that the procuring of fire insurance upon county bridges is in the public interest, then I know of no legal objection to such a plan.

April 26, 1952—052-137.

COUNTY COMMISSIONERS—PUBLIC ROADS—OBSTRUCTION—EASEMENT

QUESTIONS: 1. Where the public has acquired an easement by prescription for roadway purposes over the lands of the individual, who thereafter barricades such road, may the Board of County Commissioners require the owner of the property subject to the easement, to remove the obstruction?

2. If question one is answered in the affirmative what will be the width of the roadway?

3. Also, if question one is answered in the affirmative, will such easement extend to its terminus at the banks of the Suwanee River, so as to include an area used by the public for more than the prescriptive period, for turning around of vehicles?

To: Honorable Cecil H. Brown, Attorney, Board of County Commissioners, Williston, Florida:

For the purpose of this opinion, we are assuming that there is no question the prescriptive period has run and that the public has heretofore established an easement over the land, which way was customarily used by persons, as a means of reaching and leaving the banks of the Suwanee River.

Section 343.15, F.S., provides that the public roads of counties established by law or *prescription* are public roads under the control of the Board of County Commissioners. So the road under consideration thereby becomes a public road inasmuch as it had been established by prescription.

The leading case in Florida, dealing with easements by prescription, is that of *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625. The court refers to what is now the statute above designated, stating that, by virtue of it, our law recognizes prescriptive right, and, the common law rule of 20 years continuous and uninterrupted use prevails in Florida. The court further says: "Long-continued use will, as against the owner of the fee, vest in the public an easement in the lands for highway purposes."

Boards of County Commissioners are, by law, charged with the duty of maintaining county roads (§343.01, F.S.). In *Dade County v. Snyder*, 140 Fla. 135, 191 So. 185, the principles set down in *Zetrouer v. Zetrouer*, *supra*, were affirmed. The court below dismissed the bill of complaint of the Board of County Commissioners, praying for injunctive relief against the defendant for obstruction of a county road. The Supreme Court reversed the lower court, with directions to enter a final decree in behalf of the County Commissioners, thereby recognizing the right of the Board to institute the suit. See also the case of *Citrus County v. Love*, 37 So. 2d 834, which was a bill to enjoin the interference with a public road. You will also be interested in the case of *Grove v. Reeder*, 53 So. 2d 530, which recognizes the right of private citizens to enjoin the obstruction of the public use of a road. Also see, *J. C. Vereen & Sons v. Houser*, 122 Fla. 325, 167 So. 45.

It, therefore, appears from the above that the members of the Board of County Commissioners are, under the stated facts, proper party plaintiffs, and may, therefore, enjoin, upon proper proof, the obstructing of a county road.

In answer to question two, the width of the easement for roadway purposes is necessarily dependent upon the width of the road which has been customarily used by the public for the required prescriptive period. For example, if the roadway has been established as 20 feet, then the owner of the fee should be required to keep open a roadway of twenty feet in width.

The same method used in arriving at a conclusion to question two should be followed in determining question three. The answer necessarily depends upon the proof, adduced as to the area customarily traveled and used by the public for the required prescriptive period, thus ripening into a public easement.

As indicated above, your problem is one for the decision of a court of competent jurisdiction in an appropriate proceeding.

November 14, 1951—051-409.

COUNTY TAX COLLECTOR—COMPENSATION—MUNICIPALITIES—LIABILITY

QUESTION: Where the County of Bradford makes a levy under §343.17, F.S., is it mandatory that the City of Starke pay the fees of the County Tax Collector upon the city's proportion of the tax collected by said Tax Collector?

To: Honorable George L. Patten, City Attorney, Starke, Florida:

Section 343.17, F.S., authorizes the board of county commissioners to levy a tax not to exceed 5 mills on the dollar on all property in the county for road and bridge purposes, the statute concluding with the following:

“* * * provided, however, that one-half the amount so realized from said special tax on the property in incorporated cities and towns, shall be turned over to said cities and towns, to be used in repairing and maintaining the roads and streets thereof, as may be provided by the ordinances of such cities and towns.”

Dade County vs. City of Miami, 77 Fla. 786, 82 So. 354; City of Sanford vs. Orange County, 54 Fla. 577, 45 So. 479; Lee County vs. City of Fort Myers, (Fla.) 52 So. 2d. 792, and other cases have construed this statute along with the provisions of §193.32, F.S. In none of these cases does it appear that the question has been raised as to the responsibility of the city for any portion of costs of collection. The very language “that one-half of the amount so realized from said special tax” on property within municipalities shall be paid over to cities, indicates that the city's share is to be 50% of the gross collections under the levy, without any deductions or charges being made against its share. The cases, Dade County vs. City of Miami, *supra*, and Lee County vs. City of Fort Myers, *supra*, to a limited extent, bear out this conclusion for in each instance, the court required the county to pay 50% of the total proceeds realized from the taxes.

In the absence of special legislation or charter provisions, I do not believe it is mandatory upon the city to pay any of the cost of collecting the sums realized under this special levy.

The question is answered in the negative.

CHAPTER XXV

RAILROADS AND OTHER PUBLIC UTILITIES

RAILROAD AND PUBLIC UTILITIES COMMISSION

December 5, 1951—051-440.

RAILROAD AND PUBLIC UTILITIES COMMISSION—CORPORATIONS—MANUFACTURED—GAS AND OIL—SALES—REGULATORY JURISDICTION

QUESTION: Would a corporation engaged in the business of selling at wholesale manufactured gas, oil, and petroleum products only to public utilities and not to the public or to industrial consumers, come within the regulatory jurisdiction of the Florida Railroad and Public Utilities Commission by virtue of Ch. 26545, Laws of 1951 (Ch. 366, F.S.)?

To: Honorable Bolling C. Stanley, Executive Secretary, Florida Railroad and Public Utilities Commission:

In defining a "public utility" which is subject to the regulatory jurisdiction of the Florida Railroad and Public Utilities Commission under Ch. 26545, Laws of 1951 (Ch. 366, F.S.), §2 (\$366.02, F.S.) of that law provides, in pertinent part, as follows:

"The term 'public utility' as used herein means and includes every person, corporation, partnership, association or other legal entity and their lessees, trustees or receivers, now or hereafter either owning, operating, managing or controlling any plant or other facility supplying electricity or gas (natural, manufactured or similar gaseous substance) to or for the public within this state, directly or indirectly for compensation; . . ."

Your letter recites that the proposed company under consideration will not deal directly with the public in any way but will sell its products exclusively at wholesale, to two or more public utilities, which public utilities are presently engaged in selling gas and re-tailing to domestic and commercial and industrial consumers. Further, this proposed company will manufacture no gas, but will secure such gas from another company engaged primarily in manufacturing chemicals but which will have a supply of manufactured gas as a by-product, available for sale.

Since this proposed corporation here being considered would not, according to your letter, be supplying manufactured gas, oil or other petroleum products, to or for the public, but would supply such products only to other corporations or companies which themselves would be subject to the jurisdiction of the Commission, I do not believe that such proposed corporation would come within the intended scope of the law, nor within the definition of "public utility" as contained in the law.

As indicated by your letter, the sales at wholesale by a corporation to regulated public utilities only would not be sales to the

public, and the interest of the public would not necessarily be affected thereby. However, when the purchasing utility companies in turn sell to the ultimate consumers, the general public would be affected and the rates would be governed by the Commission in accordance with the statute. And in fixing rates at this point, it is my opinion that the Commission would be empowered to determine whether the public utility was purchasing gas from a supplying corporation at a higher cost than that at which the utility company could itself manufacture such gas, or otherwise acquire same. If so, the Commission would, in my opinion, have authority to require the public utility company to absorb the difference in cost, thus protecting the public from paying higher rates based on excessive purchase costs incurred by the utility company when obtaining the gas from a supplying corporation.

Based on the foregoing interpretation, then the question as stated is answered in the negative.

CHAPTER XXVI

CONSERVATION, ARCHEOLOGY AND GEOLOGY

FISH AND GAME, GENERALLY

July 10, 1951—051-208.

GAME AND FRESH WATER FISH COMMISSION—FRESH WATER PONDS—JURISDICTION

QUESTION: Is the taking of fresh water fish from privately owned fish ponds regulated by rules and regulations of the Game & Fresh Water Fish Commission?

To: *Honorable Fred T. Bennett, County Judge, Washington County, Chipley, Florida.*

Section 371.04, F.S., provides that all fish . . . found within rivers, creeks, canals, lakes, bayous, lagoons, bays, sounds, inlets, and other bodies of water within the jurisdiction of the State of Florida, *excluding all privately owned enclosed fish ponds not exceeding one hundred fifty acres in area, are property of the State of Florida.*

The above statute follows the common law which seems to be that there can be no control exercised over privately owned, non-navigable fish ponds and lakes.

Article IV, §30, Constitution of Florida, invested jurisdiction over the *fresh water fish of the State of Florida* in the Game and Fresh Water Fish Commission. However, I do not think that the said amendment enlarged the jurisdiction of the Game and Fresh Water Fish Commission so as to cover any fish or water except those mentioned in §371.04 (See 1947-48 Biennial Report, p. 402, AGO 047-128).

For a lake to be privately owned within the meaning of the statute, it must not exceed 150 acres, and must have no connection with outside waters to and from which fish can pass, and the pond or lake must be situated entirely upon property owned by the person or corporation maintaining such fish, ponds or lakes. (See C. J. Fish, and C. J. S. under the same subject, also *Newman v. Ardmore Rod & Gun Club*, 125 P. 2d 191; also AGO 043-300, Biennial Report 1943-44, p. 329).

Your question is answered in the negative.

August 14, 1952—052-252.

GAME AND FRESH WATER FISH COMMISSION—FRESH WATERS—FISHING DEVICES—REGULATION

QUESTION: May the Game and Fresh Water Fish Commission prohibit the use of certain fishing devices or methods of taking fish in the fresh waters of the State without regard to whether or

not said devices or methods are being used for the taking of fresh water fish or salt water fish?

To: Honorable D. R. Smith, County Judge, Ocala, Florida:

Under §30, Art. IV, of the State Constitution, the Game and Fresh Water Fish Commission is granted power "to fix open and closed seasons, on a state-wide, regional or local basis, as it may find appropriate, and to regulate the manner and method of taking, transporting, storing and using birds, game, fur-bearing animals, *fresh water fish*, reptiles and amphibians..." This provision of the State Constitution grants the Commission jurisdiction over *fresh water fish* and *not over the fresh waters* of the State (see Beck v. Game and Fresh Water Fish Commission, 160 Fla. 1, 33 So. 2d. 594; State v. Sullivan, 158 Fla. 870, 30 So. 2d. 919; Price v. St. Petersburg, 158 Fla. 705, 29 So. 2d. 753; and other cases.) The Commission clearly has the power to prohibit the taking of fresh water fish by the use of traps, gigs, nets, seines, baskets and similar devices; however, this power does not necessarily extend to prohibiting the use of such devices in the fresh waters of the State, especially in those waters where both fresh water fish and salt water fish are to be found in quantities. In such waters the people have the right to take salt water fish in accordance with the statutes and laws regulating the taking of such fish and the Game and Fresh Water Fish Commission has no jurisdiction over the taking of such salt water fish. The Commission may prohibit the use in such waters of such devices *for the purpose of taking fresh water fish* but not for the purpose of taking salt water fish; the taking of salt water fish is regulated by statute.

The State may, as incidental to the principal object of its statutes regulating the taking of game and fish, prohibit the possession of like game and fish although taken during the open season or taken in another state or country (Caldwell v. Mann, 157 Fla. 633, 26 So. 2d. 788, text 790; 38 C. J. S. 15, §11; 36 C. J. S. 863, §29). In order for such statutes to be valid it must appear that they are necessary for the enforcement of the statutes, and they may not be valid in countries where there are no fish of the kind prohibited to be found (see Caldwell v. Mann, *supra*). Such laws are not valid within themselves but only as an incident to a law regulating the taking of such fish or game. Under this same rule, where there are no salt water fish to be taken from particular waters, it may be that the Game and Fresh Water Fish Commission might prohibit the use of fish traps, gigs, nets, seines, baskets and the like in such waters. This would seem to be true because there would be no apparent legal use of such equipment in such waters. In waters where there were both fresh water fish and salt water fish to be taken then this rule would not seem to be applicable.

The Constitution limits the jurisdiction of the Game and Fresh Water Fish Commission to fresh water fish; the Commission has no jurisdiction over salt water fish. This raises the question as to what are fresh water fish. "Fresh water fish" is defined in §371.01, F.S., as including "all classes of pisces that are indigenous to fresh water." This definition was used in the statutes of this State as early as Ch. 11838, Laws of 1927. The word "indigenous" is defined by Webster as "produced, growing or living naturally in..." A "fresh

water fish," therefore, is a fish produced, growing or living naturally in fresh water.

In rivers and creeks emptying into the sea doubtless both fresh water fish and salt water fish will be found near their mouth; said fish readily passing from one type of water to the other. Doubtless types of fish usually found in salt water will be found in fresh water and vice versa. It may be that the same type of fish may be found growing or living in both salt and fresh water. This seems to be true with mullet type fish; mullet type fish are to be found growing and living in the fresh waters of the St. Johns River and Lake Okeechobee, evidently naturally. This raises the question of whether or not there may be two types of mullet, and maybe of other salt and fresh water type fish, one indigenous to salt water and the other to fresh water. This is a question of fact upon which we must decline to pass upon for want of sufficient evidence; furthermore it appears to be a judicial question that should be passed upon by the courts, upon sufficient evidence adduced. We feel that a salt water type fish found in fresh water should *prima facie* be presumed to be a salt water fish unless and until proven to have become indigenous by competent evidence.

From the above and foregoing authorities the above question may be answered to a limited extent in the affirmative. The factual conditions may require a different answer in cases. The fact and circumstances in each case must be weighed and determined and the answer derived therefrom measured by the above mentioned rules of law. A definite answer of the above question does not seem possible under the circumstances.

GAME AND FRESH WATER FISH

February 8, 1952—052-35.

GAME AND FRESH WATER FISH COMMISSION— CONSERVATION OFFICERS—SEARCH WARRANTS

QUESTION: "May a conservation officer of the Game and Fresh Water Fish Commission, under the authority granted by §372.07, F.S., go onto posted property in performance of his official duties, without a search warrant under the following conditions:

- (a) Regardless of the ownership of the land.
- (b) Where the land is posted by a lessee and the lessor is a private individual or corporation.
- (c) Where the land is posted by a lessee under a grazing lease with the State as lessor?"

To: *Honorable Richard M. Stanley, Prosecuting Attorney, Collier County, Immokalee, Florida:*

Section 372.07, F.S., provides that the Game and Fresh Water Fish Commission and each and every of its duly authorized conservation agents, have power and authority, throughout the state, to enforce all laws relating to game, non-game birds, fresh water fish and fur-bearing animals, and *in connection with said laws, in the enforcement thereof and in the performance of their duties thereunder, to go upon all premises, posted or otherwise.* Any person

found in the act of violating any of the provisions of said laws or in pursuit immediately following said violation, may be arrested by said agents upon *probable cause without a warrant*.

In view of the foregoing statute, the constitutionality of which this office does not pass upon, it is my opinion that your question should be answered in the affirmative.

March 2, 1951—051-44.

ELECTION—COMMISSION CHAIRMAN—TIE VOTE

QUESTION: 1. May the chairman of the Commission surrender the chair to the director to preside during business meetings of the commission?

2. May the Commission elect a chairman, pursuant to Article IV, §30 (1) of the State Constitution, when there are only four members and there is a tie vote?

3. If there is a failure, under Art. IV, §30 (1) of the State Constitution to elect a chairman for the commission, does the existing chairman hold over until a chairman is duly selected?

To: *Honorable Coleman Newman, Director, Game and Fresh Water Fish Commission:*

Article IV, §30 (1) of the State Constitution, after providing for the membership of the Game and Fresh Water Fish Commission, further provides that "the members so appointed shall annually select one of their members as chairman of the commission." The Constitution does not direct the manner of selection of the chairman nor does it provide procedure when the commission is unable because of a tie vote to make such selection. There is no expressed authority in the Constitution or the statutes for the chairman to surrender the chair to a non-member of the commission; there being no expressed provision in the Constitution upon these points, we must examine the general laws and rules of procedure followed in proceedings before boards and commissions. (See 67 C. J. S. 870). Robert's Rules of Order is generally accepted authority in this country for proceedings before boards and commissions, when the statutes and laws do not make express provision for such procedure. This work is extensively used by Congress, state legislative bodies, as well as boards and commissions, both governmental and private.

It appears to be generally accepted procedure for the chairman of a board or commission, at strictly business meetings, when, for any reason, he is unable to preside, to call upon some member of the board or commission, and not upon some non-member, to preside in his place and stead (Robert's Rules of Order, Art. 10, §58, p. 240). The first question is, therefore, answered in the negative.

The Constitution, as above mentioned, requires the commission to annually select one of its members as chairman. The manner of selection is not expressly provided; however, it is to be presumed that the selection is to be made by a majority of the board. It is also to be presumed that the voting upon any motion or selection should be in the usual manner. A tie vote amounts to no selection at all; therefore, any attempt to elect a member chairman where there

is a tie vote, there is no selection made. (Robert's Rules of Order, Art. 10, §58, p. 238). Therefore, your second question is answered in the negative.

Where there is a failure to annually select a chairman, as required by the Constitution, we feel that the constitutional requirement is a continuing one and that the selection may be made at any time after the expiration of the term of the existing chairman. The chairman of the commission hears a similarity to the president or other presiding officer of a corporation or of its board of directors. The usual rule concerning corporations is that upon the failure to select a presiding officer, as directed by the statutes or by-laws, the existing president or chairman holds over until his successor is duly chosen. Under §14, Art. XVI, State Constitution, State, county and municipal officers continue in office after the expiration of their terms until their successors are duly qualified. We think that the chairman of the Game and Fresh Water Fish Commission is in the nature of a public office; therefore, we feel that the existing chairman holds over until his successor is duly selected. This answers the third question.

February 29, 1952—052-59.

GAME AND FRESH WATER FISH COMMISSION—FRESH WATER FISH REGULATIONS

QUESTION: Is it within the authority of the Board of County Commissioners of Brevard County, Florida, to prohibit seining for fresh water fish in the fresh waters of said county, or is such authority and power vested in the Game and Fresh Water Fish Commission?

To: Honorable Noah B. Butt, Attorney, Board of County Commissioners, Brevard County, Cocoa, Florida:

The Supreme Court of Florida held in *State ex rel Griffin v. Sullivan*, 30 So. 2d. 919:

"We think the rule of the Game and Fresh Water Fish Commission is the governing law. Section 30, Article IV of the Constitution vested the management, restoration, conservation and regulation of fresh water fish in the Game and Fresh Water Fish Commission and gave it exclusive power to fix bag limits, open and closed seasons, and to *prescribe the method of taking fresh water fish from Florida waters*. When the Commission prescribes a reasonable rule for doing this it is not within the power of the legislature to change it."

In view of the foregoing, it is my opinion that the authority to regulate the taking of fresh water fish in Brevard County is vested in the Game and Fresh Water Fish Commission and that the Board of County Commissioners is without authority to prohibit seining, or in any manner exercise jurisdiction over the fresh water fish in the county.

March 28, 1952—052-109.

GAME AND FRESH WATER FISH COMMISSION—GIG FISHING—FISHERMAN'S HELPER—LICENSE

QUESTION: 1. Since the 1951 Legislature repealed §372.20,

F.S., is it unlawful to take or attempt to take gar fish and mud fish from the fresh waters of the state by means of a gig?

2. Is a person paddling a boat and helping to prepare bait for a licensed commercial fisherman engaged in commercial fishing to the extent that he would be required to purchase a license?

To: Honorable W. F. Anderson, County Judge, Levy County, Bronson, Florida:

Article IV, §30, Constitution of Florida, provides that the management, restoration, conservation and regulation of fresh water fish of the State of Florida shall be vested in the Game and Fresh Water Fish Commission. Among other powers expressly granted to said commission by this section of the Constitution, is the power to fix seasons, *regulate the manner and method of taking*, transporting, storing and using fresh water fish.

The Supreme Court of Florida held in *State ex rel. Griffin v. Sullivan*, 30 So. 2d. 919:

"We think the rule of the Game and Fresh Water Fish Commission is the governing law. Section 30, Article IV of the Constitution vested the management, restoration, conservation and regulation of fresh water fish in the Game and Fresh Water Fish Commission and gave it exclusive power to fix bag limits, open and closed seasons, and to *prescribe the method of taking fresh water fish from Florida waters*. When the Commission prescribes a reasonable rule for doing this it is not within the power of the legislature to change it."

In view of the foregoing, it is my opinion that Rule 9 of the rules and regulations of the Game and Fresh Water Fish Commission, which prescribes the lawful method for taking fresh water fish, is the controlling law. Said rule prohibits the taking of fresh water fish by means of a gig. However, as these rules are changed from time to time, I respectfully suggest that you contact the Commission relative to this matter.

In reply to your second question, I do not find any law providing for a license to take fresh water fish *commercially*. §372.64, F.S., provides for a license for boats engaged in fresh water fishing. Section 372.57, F.S., provides among other things, for a license for non-residents to take fresh water fish for noncommercial purposes, and a license for a resident to take fresh water fish with pole and line, rod and reel, plug, bob, spinner, spoon, fly, troll, or other artificial bait or lure. Section 372.65, F.S., provides for both a wholesale and retail fresh water fish dealer's license, which, when construed in the light of the Supreme Court's decision in *Hall v. Caldwell*, 37 So. 2d. 421, would not apply to a commercial fisherman taking and selling his own catch, unless he sold directly to the consumer.

In view of the foregoing and replying to your second question, it is my opinion that the laws of Florida do not provide for a *commercial fishing* license for a person paddling a boat and helping to prepare bait.

September 7, 1951—051-307.

GAME AND FRESH WATER FISH COMMISSION—AUTOMOBILES—PURCHASES

QUESTION: Does the purchase of automobiles by the Game and Fresh Water Fish Commission come within the prohibitions contained in §§116.12 and 116.20, F.S.?

To: Honorable C. M. Gay, State Comptroller:

Sections 116.12 and 116.20, F.S., prohibit any state officer or employee, agency, department, or institution from purchasing or contracting to purchase any motor vehicle for the use of himself or another, to be paid for out of funds of the state of Florida or any department thereof unless specific appropriation has been made by the legislature for the purchase of such motor vehicle. Under §§116.16 to 116.19, F.S., certain state agencies are exempted from the provisions of §§116.12 and 116.20. The Game and Fresh Water Fish Commission is not one of those specifically exempted, and apparently has not received any specific appropriation for the purchase of automobiles. However, as you point out in your letter, that agency contends that their purchases of motor vehicles do not come within the statutes because of the constitutional provisions covering the Game and Fresh Water Fish Commission. Hence, the question here involved is whether or not the Game and Fresh Water Fish Commission has constitutional power to make such purchases despite the statutory provisions discussed above.

Article IV, §30, of the State Constitution, establishes the Game and Fresh Water Fish Commission a constitutional agency, and defines its duties, powers and responsibilities.

It is my opinion that the language of subsections 4 and 6 of said constitutional provision which gives the Commission power to acquire by purchase "all property necessary, useful or convenient, for the Commission's use in exercising its powers," and gives it the right to use the State Game Fund as the Commission "shall deem fit in carrying out the provisions hereof," is so broad as to give the Commission authority to make such purchases as are necessary to carry out its duties and responsibilities without regard to the statutory limitations placed on other agencies. Since application of the statutes here under consideration would result in placing a limitation on the constitutional powers of the Commission, and since it is a well known rule of law that the legislature cannot by statute limit, amend or change a constitutional provision, it is my opinion that the purchase of automobiles by the Game and Fresh Water Fish Commission does not come within the prohibitions contained in §§116.12 and 116.20, F.S., and that your question should be answered in the negative.

September 25, 1951—051-332.

LICENSE FEES—NONRESIDENT CHILDREN—EXEMPTIONS

QUESTION: Under §372.57, F.S., are non-resident children exempt from the payment of the license fee as set out in said section?

To: Honorable Ben L. McLaughlin, Director, Game and Fresh Water Fish Commission:

It is my opinion that the word *residents*, as used in §372.57, F.S., applies only to residents over sixty-five years of age. Children under fifteen years of age whether residents or non-residents are exempt. Non-residents over the age of sixty-five would be required to purchase a license.

Your question is answered in the affirmative.

October 24, 1951—051-373.

FRESH WATER FISH—STILL FISHING—ROD AND REEL— LIVE BAIT

QUESTIONS: Is a person required to purchase a fishing license as provided in §372.57, F.S., to fish for fresh water fish with a rod and reel, which is baited with worms or live bait and used in "still fishing"?

To: Honorable Ben L. McLaughlin, Director, Game and Fresh Water Fish Commission:

Section 372.57, F.S., provides that residents of the state who take fresh water fish in the fresh waters of the state with pole and line, *rod and reel*, plug bob, spinner, spoon, fly, troll, or other artificial bait or line shall purchase a fishing license in the amount of \$1.75.

Exempted from the foregoing provisions are residents over the age of sixty-five and children under the age of fifteen years. Persons fishing in the county of his or her residence for non-commercial purposes with not more than three *poles and lines* are also exempt. (§371.30).

In view of the foregoing, it is my opinion that when a person elects to use a rod and reel to do still fishing, rather than a pole and line, he is required to purchase a fishing license as provided by law. I do not think that the fact that the rod and reel is baited with a worm or live bait, rather than with artificial bait, makes any material difference. Your question is answered in the affirmative. (See AGO No. 050-467).

STATE BOARD OF CONSERVATION

May 1, 1952—052-142.

COUNTY COMMISSIONERS—SALT WATER FISHING— SELLING BAIT—RENTING BOATS—LICENSES

QUESTION: Is the Board of County Commissioners of Dade County, which is engaged in the business of renting boats and selling bait for salt water fishing, required to purchase licenses for such boats and/or a retail or wholesale seafood dealer's license required by Chs. 373 and 374, F.S.?

To: Honorable George Vathis, Supervisor, State Board of Conservation:

It is a well established principle of law that counties possess

only such powers and authority as have been expressly delegated to them by statute or which are necessarily or reasonably implied from the powers expressly granted to them. 14 Am. Jur. 188, §5; *Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638. For the purpose of this opinion it is assumed that Dade County is engaging in the activities here in question under appropriate authority.

Section 373.10, F. S., provides that: "No boat, schooner, launch, or other vessel, that plies or operates in the tidal or salt water of this state, may engage, in any way, in fishing, transporting fishermen or fishing parties, or otherwise have anything to do with salt water fishing, seafoods or other products of the salt water of this state, until a license therefor shall have been procured from the supervisor of conservation." Said section further provides the amount of the tax in accordance with the size of the boat. Section 373.12, provides that the supervisor of conservation shall furnish to each licensed boat or vessel a license number and a metal tag, which shall be prominently displayed on the boat or vessel.

Section 374.30, F. S., requires "seafood dealers", prior to doing business in Florida, to procure from the supervisor of conservation a license. Section 374.31, which defines wholesale and retail seafood dealers, includes "any person, firm, or corporation . . . who deals in or sells . . . seafoods for bait." There are no statutory exemptions to the aforementioned sections of Chs. 373 and 374, so that unless some established rule of law exempts counties from the licenses imposed by these chapters, it would appear that the Board of County Commissioners will be required to secure such licenses.

There is a recognized rule of law that the state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication, (59 Corpus Juris 1103, §653). Counties are generally considered as subdivisions or agencies of the state (*Amos v. Mathews*, 99 Fla. 1, 126 So. 308). However, although municipalities are also considered subdivisions of the state, our Supreme Court has held that they are subject to legislative regulations applicable to private businesses when they engage in such business activities. (*City of Lakeland v. Amos*, 143 So. 746). And while the Supreme Court has seen fit to make a distinction between the counties and municipalities regarding their respective liability for torts, (*Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 372), it has also recognized that, like a municipality, a county exists as a corporate entity as well as in a governmental capacity, (*State v. Peninsular Telephone Company*, 73 Fla. 913, 75 So. 201).

In discussing the status and general nature of counties, the Supreme Court in *Amos v. Mathews* (supra), made the following very pertinent observation:

"While a county in the performance of certain functions is an agency or arm of the state, it is also something more than that. If a county were no more than a mere agent of the state—the state acting locally—bonds issued

by a county would in effect constitute state bonds, and therefore by virtue of Section 6, Article IX of the Constitution would be void ab initio. While the county is an agency of the state, it is also under our Constitution, to some extent at least, an autonomous, self-governing, political entity with respect to exclusively local affairs, in the performance of which functions it is distinguished from its creator, the state, and for its acts and obligations when acting in purely local matters the state is not responsible."

The activities entered into by the county, in this case appear to be strictly local in nature. This conclusion is supported by the fact that there is no general legislative authority for counties to engage in such activities. In addition, the nature of the activities negates the performance by the county of a governmental function of the State. It is therefore my opinion that Dade County, in regard to the activities in question, is not operating as an agency of the State, but that said county is engaged in a business or occupation, as distinguished from the performance of an authorized governmental function, and therefore the regulations that by law are applicable to such business activities or occupations when engaged in by private citizens or corporations may be made applicable, unless otherwise provided by law; that consequently, said county does not come within the rule of statutory construction aforementioned, and therefore should procure the licenses required by Chs. 373 and 374, for salt water fishing boats and seafood dealers.

July 30, 1952—052-238.

GAME AND FRESH WATER FISH COMMISSION— SALT WATER FISH—JURISDICTION

QUESTION: Does the Game and Fresh Water Fish Commission have jurisdiction over the salt water fish which may be found in the fresh waters of Florida?

To: *Honorable Ben L. McLaughlin, Director, Game and Fresh Water Fish Commission:*

Article XVI, §33, Constitution of Florida, provides:

"The Legislature may vest in such board or commission, now created or that may be created by it, authority to make and establish rules and regulations without regard to uniformity of application, relating to the conservation of salt water fish and salt water products."

Chapter 373, F. S., creates a State Board of Conservation and invests in said board certain powers and jurisdiction over salt water fish. However, in regards to the matter, the Supreme Court of Florida held in the case of *Price v. City of St. Petersburg*, 29 So. 2d 753, that the Legislature of Florida had not divested itself of any power to legislate in regard to the fishing industry in salt waters of the state nor has such power been withdrawn by the Constitution.

In view of the foregoing, it appears that the sole jurisdiction over salt water fish rests with the Legislature of Florida and the

State Board of Conservation, to which the Legislature has delegated certain powers to regulate the salt water fishing industry.

The Game and Fresh Water Fish Commission, which was created by Art. 4, §30, Constitution of Florida, has only the power and jurisdiction conferred on it by virtue of said constitutional amendment and acts of the Legislature enacted in aid thereof. Said amendment gives the Game and Fresh Water Fish Commission jurisdiction over fresh water fish and I do not find any subsequent action by the Legislature that confers to the Commission any jurisdiction over salt water fish. However, it may be said that the jurisdiction of the Commission over fresh water fish is so exclusive, that jurisdiction may be exercised over the fresh water fish of the State of Florida, regardless of whether they be found in fresh or salt water.

Your question is answered in the negative.

August 25, 1952—052-264.

STATE BOARD OF CONSERVATION—SALT WATER FISH DESTRUCTION—RULES

QUESTION: Does the State Board of Conservation have the authority to make a rule which will carry out the recommendation set forth in paragraph 12, page 3, of the Preliminary Report on the effects of seismic exploration upon certain Florida fisheries, prepared by C. P. Idyll of the Marine Laboratory of the University of Miami?

To: State Board of Conservation:

Section 12 of the report referred to in the foregoing question provides:

"Because of the presence of large schools of mullet in East and Escambia Bays during the late summer and fall, and because of the uncertainty of the effect of explosions on the success of shrimping, it is suggested that seismic operations in these areas be postponed until January 1, 1953."

In view of §§373.02 and 373.06 (1) (a)-(2), it is my opinion that the State Board of Conservation has the authority to make and promulgate rules to safeguard and protect the saltwater resources in the salt waters of the State of Florida. It is further my opinion that such authority includes the power to prohibit the destruction of salt water fish or other salt water resources of the state by seismic exploration or any other activity in the salt waters that is not compatible with the safeguarding of the supply thereof.

September 28, 1951—051-340.

COUNTY JUDGES FEES—NONRESIDENTS—BOAT AND FISHING LICENSES

QUESTIONS: 1. In view of the provisions of §373.10, F. S., as amended by Ch. 26973, Laws of 1951, what boat license taxes should be charged a nonresident?

2. In view of the provisions of §374.30 (5), F. S., which requires as a condition precedent the applicant for a nonresident

fishing license shall secure a certificate from the County Judge as to his place of residence, is it within the authority of the State Board of Conservation to furnish the County Judge with such forms of certificate?

3. If so, what fee should the County Judge receive for issuing these certificates?

4. How long must a nonresident reside in the state of Florida to be exempt from paying the nonresident boat tax and fishing license tax?

To: Honorable George Vathis, Supervisor, State Board of Conservation:

Section 373.10 (1) (a) and (b), F. S., provide for licenses required for boats, etc., engaged in salt water fishing, etc., in tidal or salt waters of this state. The amount of the license depends upon the size of the boat as set forth in said paragraphs (a) and (b). Paragraph (c) of the subsection provides:

"An additional license tax of twenty-five dollars per vessel shall be required of all such vessels owned wholly or in part by aliens or nonresidents of the state."

It appears that Subsection 373.10 (1), except paragraph (c) thereof, was originally §1 of Ch. 17917, Laws of 1937; and that said paragraph (c) thereof derived from §2 of Ch. 17917. This statement as to derivation is based upon information in Florida Statutes, and also on research made independent of such information.

Section 373.25, prior to its amendment by Ch. 26973, subject to certain exceptions therein set forth, provided in part that, "an additional license tax of twenty-five dollars shall be required of all aliens or nonresidents . . . on all boats, vessels, schooners or launches engaged in fishing in this state, owned in whole or in part by such alien or nonresident in addition to the boat license tax required in this chapter." This section derived from §1 of Ch. 20906, Laws of 1941, which amended §2 of Ch. 17917. Thus it appears that paragraph (c) of §373.10 (1) and §373.25 trace back to the same original enactment. The authority for including paragraph (c) of §373.10 (1) in the revision of Florida Statutes is not apparent.

Chapter 26973, Laws of 1951, amends §373.25. It is sufficient here to state that the additional \$25 boat tax heretofore imposed by said section, by virtue of such amendment was replaced by a tax on boats according to described sizes. The amended section states that this is an additional license tax required of all aliens or nonresidents of the state on all boats, etc., that are engaged in fishing or have to do with fishing in this state, owned in whole or in part by such alien or nonresident, "in addition to the boat tax required in this chapter."

The rules applying to the construction of §373.25, as amended, in relation to paragraph (c) of §373.10 (1), concerning license taxes for boats of aliens and nonresidents, and the other provisions of said subsection relating to boat license tax, are the same

as obtained with respect to the provisions of §373.25 prior to such amendment in relation to the mentioned provisions of §373.10 (1). It is apparent that uncertainty existed and now exists, hence ambiguity existed and now exists, as to the meaning and application of §373.25 prior and subsequent to amendment, in these respects: (1) Does the wording, in reference to the tax imposed, "in addition to the boat license tax required in this chapter," appearing in §373.25 as now amended and prior to amendment, refer to the regular boat tax fixed by §373.10 (1), (a) and (b), or to such tax and the *additional* tax on aliens and nonresidents fixed by paragraph (c) of the subsection? (2) The provisions of §373.10 (1) apply to boats, etc., operated in tidal and salt waters, whereas, under the wording of §373.25, prior to and after amendment, the tax therein imposed is not restricted to boats, etc., operated in tidal and salt waters; hence does the tax imposed by the latter section, as amended, apply only to those boats operated in tidal and salt waters? These questions are real and not imaginary and result in ambiguity in meaning as to the laws involved.

Generally, it may be stated that a revision of our statutes adopted in the manner provided by law and the constitution fixes the statute law of Florida. *Davis v. Power Company*, 61 Fla. 246, 60 So. 759; and even where a 1937 act was held unconstitutional because of defective title and by error included in Florida Statutes, it was held valid. *State v. Lee*, 156 Fla. 291, 22 So. 2d. 804. But where conflicting statutes were included in Florida Statutes, or in instances when the meaning of a statute included in the revision is ambiguous, the Court may go beyond the revision and to original enactments to ascertain legislative intent. *Lykes Bros. v. Bigbee*, 155 Fla. 580, 21, So. 2d. 37; *Commissioners of Hillsborough County v. Jackson*, 58 Fla. 210, 50 So. 423; *Atlas Rock Company v. Miami Beach Builders Supply Company*, 89 Fla. 340, 103 So. 615; 50 Am. Jur. 464. Under the rule last stated it appears that recourse to the original enactments from which derived §§373.10 (1) and 373.25 may be examined to settle these uncertainties mentioned.

We have stated above that §373.10 (1) (c) and §373.25 derived from §2 of Ch. 17917, Laws of 1937; that §373.25 prior to its amendment was §1 of Ch. 20906, Laws of 1941, which amended §2 of Ch. 17917. The titles to Ch. 17917 and 20906 leave little doubt that the taxes imposed in pursuance of such acts related to boats, etc., used in tidal or salt waters. Furthermore, as noted, it is apparent that paragraph (c) of §373.10 (1) and §373.25 derived from the same piece of original legislation. In the absence of an indication in §373.25, as amended, as aforesaid, that the amended statute imposed a tax in addition to the regular boat tax and the additional tax on aliens and nonresidents set forth in §373.10 (1), the history of the original enactments mentioned leads to the conclusion that the additional tax imposed by amended §373.25 is in substitution of all other additional taxes imposed on aliens and nonresidents in this connection.

Hence, this question is answered as follows:

Aliens and nonresidents are required to pay the license tax on boats, etc., owned in whole or in part by them and used and engaged in fishing or having to do with fishing in this state in

tidal or salt waters, imposed by §373.10 (1), except paragraph (c) thereof, and §373.25, as amended by Ch. 26973, Laws of 1951.

This opinion is subject to the provisions of §374.14 relating to operation of shrimp boats in this state by residents of other states which have reciprocal agreements with Florida.

Section 374.30 (5), F.S., as amended by Ch. 26972, Laws of 1951, requires that as a condition precedent the applicant for a nonresident salt water fishing license, as provided in said section, *shall* secure a certificate from the County Judge certifying the place of residence of said applicant. Inasmuch as §373.01, relating to the powers of the State Board of Conservation, provides that said board may acquire such property as is necessary to execute its powers, duties, and is vested with such powers and authority as may be necessary to carry out the powers and obligations conferred upon it by law, it is my opinion that the State Board of Conservation may have printed and furnish to the County Judges of the state the necessary forms to be executed by said Judges in compliance with Ch. 26971, Laws of 1951. This answers your second question in the affirmative.

In compliance with your request, I am attaching hereto a form of certificate which you may have printed and send to the County Judges.

Chapter 26972, *supra*, does not provide for a fee to be charged by the County Judge. It, therefore, seems that the County Judge is not entitled to a fee (see *Rawls v. State*, 122 So. 222; *State v. Reardon*, 154 So. 868) unless fees be provided by some other statute.

Section 36.17, F.S., appears to be a general provision fixing fees for services performed by the County Judge generally in connection with the operation of his office. In my opinion the section is broad enough to embrace and include compensation for services performed under and by virtue of Ch. 26972, Laws of 1951, and that your third question should be answered in the affirmative.

Section 373.10 (2) provides that a person shall be deemed a resident when such person has *maintained a continuous residence* in the state of Florida for a period of one year and has *actually resided in the state* for six months immediately preceding the making of application for a *boat license*. I do not find a statute relating to the length of residence in Florida required by a nonresident before said nonresident shall be exempt from purchasing the \$25 nonresident *fishing license* as provided for in §374.30. However, it is my opinion that it is the intent of the Legislature that the residence period set forth in §373.10 (2) shall apply in both cases. This answers your fourth question.

SALT WATER FISHERIES

June 18, 1952—052-191.

LOGGERHEAD OR GREEN TURTLE—PRESERVATION— VIOLATIONS—SEIZURE

QUESTIONS: 1. Where a loggerhead or green turtle is taken in the edge of the surf but before it has reached water deep enough for swimming, can it be said that such turtle was taken

"out of the waters or upon the beaches" within the meaning of §374.16, F. S.?

2. Must the word "take" in §374.16 be construed strictly as laying hold of or seizing or can it be also interpreted as including the preparation for the taking, such as waiting for the turtle to complete the laying of eggs and return to the edge of the surf before actually taking physical possession of it?

To: Honorable A. Max Brewer, County Prosecuting Attorney, Brevard County, Titusville, Florida:

Although §374.16, F. S., has never been interpreted by our Supreme Court, it appears that the obvious intent of the legislature was to help preserve and propagate the loggerhead or green turtle by prohibiting the taking or destruction of them under conditions rendering them relatively helpless and easy prey for unsportsmanlike hunters. While in water deep enough in which to swim, these turtles are not easy to catch or kill. While on shore, they are slow, lumbering, and as previously stated, almost helpless. They seldom ever come out of the water and on to shore except during the months that they customarily lay eggs. From the foregoing, therefore, it should be obvious that any interpretation of the phrase, "out of the waters or upon the beaches," which would allow a person to take, seize, or destroy these turtles as soon as they first entered the water or immediately preceding their emergence from the surf would for all practical purposes nullify the beneficent aim of §374.16.

I have been unable to find any judicial definition of the phrase "upon the beaches," but the most common definition given for the word "beach" is that area between ordinary high water mark and low water mark or the space over which the tide ebbs and flows. See *Anderson v. De Vries*, 93 N.E. 2d 251, 255, 326 Mass. 127; *Hewett v. Perry*, 34 N.E. 2d 489, 491, 309 Mass. 100. With this definition in mind it would not seem to be unreasonable to assume that the legislature desired to protect loggerhead or green turtles not only when they are on shore and completely "out of the waters" but also when they are in the shallow surf waters caused by the tides and still unable to maneuver effectively by swimming. Otherwise, as you point out, a person could wait until a turtle returned from laying its eggs on the shore and take or kill it immediately upon its entering the very shallow waters. This no doubt could be done as easily as taking or killing it while completely on dry land.

This interpretation would seem to be rendered more reasonable by the fact that the phrase in §374.16 "out of the waters" would have been sufficient standing alone if the legislature had intended that the turtles could be taken or destroyed immediately upon their entering the shallowest of water. It is, therefore, my opinion that the legislature in prohibiting the taking or destruction of loggerhead or green turtles when "out of the waters or upon the beaches," intended to prohibit such taking or destruction while said turtles are helpless in the shallow surf waters.

In answer to your second question it is my opinion that the word "take" as used in §347.16, F. S., must be construed as

the actual seizing, laying hold of, or physical possession of a green or loggerhead turtle in order for a violation of that section to occur. This is the interpretation uniformly given of the word "take" in criminal statutes. See *State v. Opie*, 170 P 2d. 736, 741, 179 Or. 187; *People v. Sanchez*, 95 P 2d. 462, 463, 35 Cal. App. 2d. 316; *City of Durham v. Wright*, 130 S.E. 161, 163, 190 N.C. 568. Under this interpretation, therefore, a person could not be prosecuted for violation of §374.16 for merely making preparations to take loggerhead or green turtles. Preliminary activities leading to the performance of an act prohibited by law does not constitute the performance of that act, no matter how closely connected such preliminary activities are to the prohibited act.

July 14, 1952—052-217.

COUNTY COMMISSIONERS—PERMITS TO CORPORATIONS— CAPTURE OF MANATEE

QUESTION: Section 374.18, F.S., provides for one permit only to be issued to any person to possess one manatee. A permit was issued to a corporation, and acting under the authority of said permit the corporation has taken into captivity such manatee. Members of that corporation are also members of a separate corporation which is now making application to capture and take into captivity a manatee. Is it legal and proper for the Board of County Commissioners of Volusia County to issue such a permit?

To: *Honorable Jess Mathas, Clerk and Auditor, Board of County Commissioners, Volusia County, DeLand, Florida:*

Even though the same officers belong to each corporation, each corporation is a separate entity. Therefore, it is my opinion that a permit may be issued to each separate corporation provided the provisions of §374.18, F.S., are fully complied with, and the Board of County Commissioners is satisfied that the interest of science will be subserved.

It is further my opinion that it is the duty of the Board to inquire into the facts and determine to its full satisfaction that these various corporations were not created as a scheme or for the sole purpose of evading the law relative to the capturing or killing of more than one sea-cow.

FLOOD CONTROL

June 25, 1952—052-198.

STATE TREASURY—FLOOD CONTROL ACCOUNT— USE OF FUNDS

QUESTIONS: 1. Under the provisions of Ch. 378, F.S., does the State Board of Conservation have authority to approve disbursements from the Flood Control Account to the Central and Southern Florida Flood Control District for:

- (a) District costs of construction incurred to relocate highways, highway bridges and other public utilities, where such relocations are necessary to execution of the federally authorized plan and provided for in that plan?

(b) District costs of acquiring lands needed for such relocations?

(c) District costs of constructing or otherwise providing for the relocation of public and private structures other than those above, incident to acquiring, outside the water storage areas, rights-of-way for canals and structures in the federally authorized plan?

(d) District costs of constructing works not in the federally authorized plan but deemed necessary thereto by the governing board of the district?

2. Does the language of the Appropriation Act, Item 21, §282.01, F.S., for Flood Control Districts (cooperation in federal project) modify or limit disbursements from the Flood Control Account for any of the foregoing purposes?

To: State Board of Conservation, C A P I T O L:

The Flood Control Account in the State Treasury above mentioned is provided for by §378.03, F.S., which provides:

"There is hereby created in the general revenue fund of this state an account to be known as flood control account. Subject to such appropriation as the legislature may make therefor from time to time, the purpose of said account shall be to provide assistance to districts described in §378.01 hereof."

And the disbursement of said fund is governed by §378.04, F.S., which provides:

"Subject to the provisions of this chapter, there shall be available to any district created under this chapter out of said flood control account, upon approval of the state board of conservation, a sum or sums of money not exceeding in the aggregate the total estimated amount required to cover the costs allocated to the district for constructing the works of said project and the acquisition of land for water storage areas. Said sum or sums shall be available as money is required for said purposes and shall be a grant to said district."

Except insofar as the same may be limited by the appropriation therefor made by the 1951 session of the state legislature out of the General Revenue Fund of the State and identified as Item 21 C. c., of §282.01, F.S., in words and figures as follows:

Flood control districts—

cooperation in federal project.....\$3,250,000

for the biennium beginning July 1, 1951. We must take note of the following language of the said appropriation, "cooperation in federal project." Under §378.03, F.S., above quoted the Flood Control Account is made "subject to such appropriation as the Legislature may make therefor from time to time . . ." which language clearly shows that there was no intention on the part of the Legislature to make an appropriation by said §§378.03 and 378.04, F.S.

It is apparent from a reading of said §§378.03 and 378.04, F.S.,

with the appropriation of the biennium beginning July 1, 1951 (§282.01, F.S.) that the expenditures for flood control during the biennium is limited to "cooperation in federal project." Even if under said §§378.03 and 378.04, F.S., other expenditures may be authorized, they are limited, under the biennial appropriation to co-operation in federal projects.

Although the reading of §§378.01, 378.02, 378.03, 378.04, 378.08, 378.16, and other portions of the flood control statutes indicates a primary intent on the part of the Legislature to provide for cooperation with the federal government under the plan adopted for flood control in what is now the Central and Southern Flood Control District, the disbursement of funds from the flood control account is largely dependent upon the appropriation acts for the future by the Legislature. The extent of the expenditure must depend upon the limitations in such appropriations, if any.

Without any limitations in the appropriations act, under §378.04, funds may be used "for constructing the works . . . and the lands for water storage areas of said district . . ." Under §378.05, "the resolution shall show the total estimated cost allocated to the district . . . for providing the works. . . . and the land for water storage areas of said district . . ." This suggests the question of "what are the works of the district?" "In order to carry out the cooperative part of the works for the district, and the effectuating purposes of this chapter (Ch. 378, F.S.) the governing board is authorized to clean out, straighten, enlarge or change the course of any waterway, natural or artificial, within *or without* the district; to provide such canals, levees, dikes, dams, sluiceways, reservoirs, holding basins, floodways, pumping stations, bridges, highways and other works and facilities which said board may deem necessary" (§378.16, F.S.) the works of the districts "include those set forth in the plan comprising the project as authorized by the Congress of the United States, *and such other* works and facilities as the governing board may deem necessary for augmenting and making more effective the works set forth in and as shall be provided under such plan." (§378.16, F.S.). These observations show that the authority of the governing board is very broad as is the use of the flood control account unless limited (as is the current appropriation) by the subsequent acts of the Legislature including appropriation acts.

In the light of the limitation contained in the current appropriations act we deem it unnecessary to determine the full extent of the powers of the governing board under Ch. 378, F.S. Under §378.04, F.S., funds of the district for constructing the works of said district and the acquisition of lands for water storage. . . . *These works of said district* "include those set forth in the plan comprising the project as authorized by the Congress of the United States" (§378.16, *supra*). Our examination of the "Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes" by the chief engineers of the United States Army, under date of February 19, 1948, seems to take into consideration the costs of lands, rights of way, easements, relocations, maintenance and operation of the district in connection with the cooperative project between the state and federal government. We, therefore, feel that:

- 1(a) District costs of construction incurred to relo-

cate highways, highway bridges and other public utilities, where such relocations are necessary to the execution of the federally authorized plan, and provided for in the plan, are within the purview of §378.04, F.S., and the appropriations act of 1951.

1(b) Lands needed for such relocations would seem to be a part thereof and within the purview of §378.04, F.S., and the appropriations act of 1951.

1(c) The cost of constructing or otherwise providing for the relocation of public and private structures other than those above, incident to acquiring, outside the water storage areas, rights of way for canals and structures in the federally authorized plan, may or may not be within the cooperative plan depending upon each individual case. If the same was considered by the engineers in their report and taken into consideration in such report, then we feel that it would doubtless come within the said cooperative plan, and covered by the 1951 appropriations act, otherwise not. With a proper appropriation therefor we feel that the district might expend funds for the above purposes although not within the cooperative plan; however, the current appropriation may not be so used.

1(d) The costs of constructing works not in the federally authorized plan but deemed necessary thereto by the governing board of the district although within the general purview of §§378.03, 378.04, and other sections of Ch. 378, F.S., would not seem to be within the 1951 appropriation act.

2. The appropriation contained in Item 21, §282.01, F.S., is limited so that it may be used only for cooperation in federal projects, notwithstanding the broader language in Ch. 378, as said §282.01 being the later expression of the Legislature.

CHAPTER XXVII PUBLIC HEALTH

STATE BOARD OF HEALTH

March 3, 1952—052-63.

BOARD OF HEALTH—CONTRIBUTIONS—MOSQUITO CONTROL APPROPRIATIONS

QUESTION: May the State Board of Health make available to the Broward County Anti-Mosquito District, through the Board of County Commissioners of Broward County, funds from the County Mosquito Control appropriation (Item 17, §1, Ch. 26859, Acts of 1951) to pay a contract having as its object the connection of an existing system of mosquito control ditches for flushing during periods of high tide and to provide continuous access for lava-eating fish?

To: Honorable C. M. Gay, State Comptroller:

The above mentioned County Mosquito Control appropriation appears to be in effect a continuation of the appropriation made in §4, Ch. 25442, Acts of 1949, now appearing as a part of §381.72, F.S. This section provides for state aid to mosquito control districts as therein defined; however, "the amount so contributed by the State Board of Health shall not exceed fifteen thousand dollars for any one county and for any one year *and the contribution shall be in insecticides, materials, trucks, equipment and personnel.*" We know of no subsequent statute removing this limitation.

We, therefore, must answer the above question in the negative, unless the contribution is made in accordance with the above quoted requirement.

October 24, 1951—051-379.

STATE BOARD OF HEALTH—"CONTRIBUTIONS"—MOS- QUITO CONTROL DISTRICTS—TRUCKS—TITLE TRANSFER

QUESTION: Is the State Board of Health, under Ch. 25442, Laws of 1949 (§381.72, F.S.), authorized to transfer title to trucks, equipment, etc., to a mosquito control district, by virtue of the authority contained in the act for the state board "to contribute" such state aid?

To: Honorable Frank Evans, Attorney, Board County Commissioners, Sarasota County, Sarasota, Florida:

Section 381.72, F.S., provides, in pertinent part, as follows: "The State Board of Health is hereby authorized to contribute annually for the control of mosquitoes and/or human-biting flies to any mosquito control district established under Ch. 388, 389 and 390, F.S., . . ." the specific sums set by the act, and further provides that "the amount so contributed by the State Board of Health shall not exceed \$15,000 for any one county and for any one year and the

contribution shall be in insecticides, materials, trucks, equipment and personnel."

Your letter states that Sarasota county is an organized mosquito control district and as such has received from the Florida State Board of Health certain equipment for use in mosquito control work. At this time, your district has a jeep supplied by the State Board of Health for such purposes, which jeep the county would now like to trade in or sell toward obtaining other equipment. However, the title to the jeep is retained by the State Health Department and your query is whether or not title to the jeep supplied the mosquito control district by the Health Department may be transferred to the district, or must it remain in the State Health Department. You further point out that the State Board of Health would have no objection to transferring the title along with such equipment, if it is determined that this procedure is permitted by the law.

As indicated in the foregoing quoted portions of the governing statutes, the State Board of Health is authorized "to contribute" such equipment to the various mosquito control districts. There is no provision in the law which indicates whether the legislature intended to transfer such equipment outright or whether it was intended that the mosquito control districts should have only the use of such equipment. Accordingly, then, it seems that the answer to your question depends primarily upon the interpretation of the word "contribute."

"Contribute" is normally defined as "giving" or "granting in common with others" and normally does not mean simply a "loan." See *Guisti vs. Guisti*, 41 Nev. 349, 171 P. 161, and *Mack vs. Wurms*, 135 Mo. 58, 36 S. W. 22. It has been held that the word "contribute" means, in part, to "give" and it has also been defined as meaning the "transfer, giving and delivery of money, property or services." See *Sacramento-Yolo Port District vs. Rodda* (Cal.), 204 P. 2d. 373, and *LaBelle vs. Hennepin County Bar Association* (Minn.), 288 N. W. 788, 125 A. L. R. 1023.

Therefore, on the basis of the foregoing definitions, and in the absence of any indication in the statute that the legislature intended the State Board of Health to retain title to such equipment when contributed to the counties, I can see no objection, if agreeable with the State Board of Health, to transferring title to such property to the mosquito control districts and, in my opinion, your question may be answered in the affirmative.

BUREAU OF VITAL STATISTICS

February 19, 1952—052-43.

REGISTRAR—NONRESIDENT COUNTY—DEAD BODIES—REMOVAL PERMITS

QUESTIONS: 1. Can a registrar from another county in the state issue removal permits for the body of a person whose death occurs, or whose dead body is found, in Monroe County?

2. Can an undertaker from another county in the state remove from Monroe County the body of a person whose death occurs, or

whose dead body is found, in Monroe County without first obtaining a removal permit from the registrar or a death certificate from the coroner?

To: Honorable Roy Hamlin, Justice of the Peace, Key West, Florida:

Your attention is directed to §§382.06, 382.10, 382.11, 936.02 and 382.10 (1), which seem to answer your questions.

When the foregoing sections are read in paria materia, it is apparent that both of your above questions should be answered in the negative. However, the coroner is by statute required to make an investigation, when the dead body of a person has been found lying in his district, only in case there is reason to believe that such person came to his death by violence or criminal negligence of another (§§936.02 and 936.03, F.S.). The term "violent, sudden and casual deaths" or "circumstances indicating foul play" as used in §936.02, supra, means the unlawful use of physical force or other agencies to cause death, and does not include mere accident or casualty (13 C. J. 1246, Note 15 (a) et seq.). The mere fact that a body lies dead does not give the coroner jurisdiction even though death was sudden, there should be a reasonable suspicion that it was caused by some violence, criminal act or negligence of another (13 Am. Jur. 108-9, §6 and F.S. above mentioned).

TUBERCULOSIS SANATORIUM

January 29, 1951—051-21.

TUBERCULOSIS SANATORIUM—PATIENTS—ADMISSION EXPENSES—COUNTY RESPONSIBILITY

QUESTION: Is a county board of commissioners authorized to defray the expenses, in whole or in part, of a patient from said county at the state tuberculosis sanatorium regardless of whether or not the patient is financially indigent?

To: Honorable Frank Evans, County Attorney, Sarasota County, Sarasota, Florida:

Chapter 392, F.S., provides for a state tuberculosis board, sanatorium, the admission of patients, etc., and for the compulsory confinement and treatment of persons having tuberculosis.

In my opinion it was not the intent of the Legislature to provide free treatment of tuberculosis patients regardless of their personal financial ability to pay for such treatment. In other words, it is incumbent upon the patient who is financially able to pay all or part of said costs to make satisfactory arrangements with the county or state to make reimbursement for such portion of said costs as the patient is able to make, as provided in the above cited chapter.

As to whether or not a patient is financially able to pay for the treatment provided by Ch. 392, the board of county commissioners must make a determination based on the particular facts involved in each case after appropriate investigation of the circumstances.

In the event the patient refuses to submit voluntarily to treatment or to contribute to such part of the cost thereof as he is able,

procedure for compulsory confinement is provided in §§392.17 and 392.18.

August 3, 1951—051-257.

TUBERCULOSIS BOARD—CONSTRUCTION—EQUIPMENT— IMPROVEMENT—REVENUE CERTIFICATES

QUESTION: Is it within the authority of the State Tuberculosis Board to issue revenue certificates for the purpose of constructing, equipping and improving State Tuberculosis Sanatoriums, when such revenue certificates are to be secured by the funds collected from any source other than the funds received from the State of Florida?

To: Honorable L. L. Lanier, General Business Manager, State Tuberculosis Board:

Section 392.04 provides that the State Tuberculosis Board may establish, conduct, maintain and operate in each of the five districts of Florida a Tuberculosis Sanatorium, and for that purpose loans may be obtained from the Federal Government, or any agency thereof, or from any other available source, and provide for the securing and repayment of said loans in any manner.

Section 392.07 (4) provides, "All moneys required to be paid by the several counties and patients for the care and maintenance of patients in the sanatoria or while being treated by the out-patient department, shall be paid to the state tuberculosis board, and said board shall forthwith transmit the same to the treasurer of the State of Florida who shall place the same in two accounts as follows, to-wit: (1) such amounts as the board shall from time to time designate as necessary to meet the interest and sinking fund requirements of the board shall be placed in the state tuberculosis sanatoria interest and sinking fund account; and (2) the balance of the money transmitted to the treasurer of the State of Florida shall be placed in the sanatoria maintenance account. All moneys from all sources placed to the credit of the board on July 1, 1949, and all moneys hereafter received by the board, other than from the State of Florida and other than the funds now or hereafter in the state tuberculosis sanatoria interest and sinking fund account, shall be placed in a separate fund known as the sanatoria maintenance account. All moneys now in or hereafter placed in: (a) the state tuberculosis sanatoria interest and sinking fund account are hereby appropriated to the use of the board to be expended in the payment of interest and sinking fund charges of the board; and (b) the sanatoria maintenance account are hereby appropriated to the use of the board to be expended in carrying out its other powers and duties, and said moneys shall not be deducted from any sums of money otherwise appropriated by the State of Florida to the board, and such moneys shall be disbursed as provided in §392.12, Florida Statutes."

In the case of *Brash v. State Tuberculosis Board*, 169 So. 218, the Florida Supreme Court held that revenue certificates proposed to be issued by the Tuberculosis Board for a federal government loan to build a sanatorium was not constitutional issuance of state "bonds," where the certificates provided for payment exclusively

from revenues to be derived from prospective operation of the sanatorium. The Court further held that the proposal of the Board to pledge to the Federal Government so much of the appropriation made by the state for establishment, maintenance, and support of the sanatorium, as necessary to make up the deficiency in payments for money loaned and interests thereon, for acquisition and maintenance of sanatorium by loan from Federal Government, was ineffectual and not authorized by state. (Brash v. State Tuberculosis Board, 167 So. 827).

In view of the foregoing it is my opinion that your question should be answered in the affirmative.

August 28, 1952—052-266.

HOSPITALS—TUBERCULOSIS PATIENTS—COUNTY RESPONSIBILITY

STATEMENT and QUESTION: A tuberculosis patient has been certified for admission to a state tuberculosis hospital located in a county other than the one in which the patient resides. Immediately after the patient's admission into the hospital, his immediate family moves to the county in which the hospital is located and establishes legal residence. The county originally certifying the patient for hospitalization feels that it is no longer liable for its share of the cost of maintaining the patient while he is in the hospital, basing their claim on the fact that the family has changed its legal residence. The five counties of the state in which the tuberculosis hospitals are located do not feel that they are financially obligated to take over this expense even though the patient's family has become residents of the county in which the hospital is located.

In the light of the above stated facts which county is liable under the laws of Florida to pay the county's share of the hospitalization for such a patient?

To: Honorable L. L. Lanier, General Business Manager, State Tuberculosis Board:

Section 392.05, F.S., provides that the Boards of County Commissioners of the several counties of the State of Florida may contract with the State Tuberculosis Board for the use of beds in such district sanatoriums by tuberculous persons from their respective counties who are financially unable to pay for such treatment.

Although §392.07 (1) and (2), F.S., does not clearly deal with your specific question, it is my opinion, in view of the same, that it is incumbent upon the county sending the patient to the hospital to continue to bear the financial responsibility of the patient.

I can well appreciate the fact that the family of the patient feels a need or desire to be near the hospital and near the patient, but to rule otherwise would mean that the five counties of Florida in which the tuberculosis hospitals are located would have to bear the expense of all indigent and semi-indigent patients, should the family of the patient take up residence in such counties. I do not think this is the intent of the statute, nor is it fair to the counties in which the hospitals are located.

October 29, 1952—052-300.

OPINION NO. 050-494 AMENDED AND RETRACTED
FUNDS—SHERIFF'S COSTS—TUBERCULAR PATIENTS—
RECOMMITMENT

QUESTION: May state funds, which would be either payable out of State Board of Health Funds or Tuberculosis Board Funds, be used for the payment of sheriff's costs in the re-arresting and transportation of a tubercular patient to a sanatorium in Tampa, from Calhoun County, when the person leaves such sanatorium after being committed without being discharged?

To: Honorable Lewis H. Tribble, General Counsel, Comptroller's Office, CAPITOL:

This office rendered an opinion (050-494), on a similar question based on Ch. 25241, Laws of 1949, (§§392.17-392.23, F.S., 1949) which law at that time governed the commitment of persons infected with tuberculosis to a state sanatorium. Such opinion, based particularly upon the language used in §392.18, F.S., 1949, was to the effect that after a person was committed to a tuberculosis sanatorium, such sanatorium was responsible for that person and if he escaped, the sheriff's costs in returning the person were to be paid from funds appropriated for tuberculosis sanatorium use. The 1951 Legislature repealed Ch. 25241, Laws of 1949, and in its place a new law (Ch. 26828, Laws of 1951) governing the commitment and compulsory isolation of tubercular patients was enacted. Therefore, I believe that Opinion 050-494 is inconsistent with the present law and is hereby retracted and amended to conform to the changes made in the law by the 1951 Legislature.

Section 392.31, F.S., being §7 of Ch. 26828, Laws of 1951, provides:

"Any person committed under this Act, who leaves the State Tuberculosis Hospital to which he has been committed without having been discharged by the Medical Director thereof, shall be recommitted by the County Judge of any county where such patient may be found to the custody of the Medical Director of any hospital operated by the State Tuberculosis Board, for such period of time as shall be determined necessary by the Medical Director of such hospital, upon an affidavit's being filed before the County Judge of such county by any representative of the State Board of Health or the State Tuberculosis Board that said person has left a State Tuberculosis Hospital and has not been discharged therefrom by the Medical Director thereof. The order of recommitment shall direct the Sheriff of the county, or the Constable in whose district such person is found, to forthwith deliver him to the Medical Director of the State Tuberculosis Hospital named in the recommitment order."

Section 392.33, being §9 of Ch. 26828, Laws of 1951, provides, among other things:

"Fees and other compensation; payment by board of county commissioners.—"

"(1) *For the services required to be performed under the provisions of §§392.25-392.36 compensation shall be paid as follows: . . .*

"(c) *The sheriff shall receive the same fees and mileage as are prescribed for like services in criminal cases; . . .*

"(2) *All fees, mileage, and charges shall be taxed by the court as costs in each proceeding and shall be paid by the board of county commissioners out of the general or fine and forfeiture funds of the county."*

In view of the foregoing, costs for recommitting a patient shall be paid by the County Commissioners of that county from which the patient is recommitted. Under the circumstances of the case presented, it may place an undue financial burden upon the County Commissioners if the tuberculosis sanatorium is negligent in confinement of such patient, but I feel that no other construction of this statute is proper and any change which would permit the State Tuberculosis Board to bear the expense must be made by the Legislature.

Chapter 381, F. S., which governs and regulates the State Board of Health has no provision for the payment of such costs, therefore, the sheriff's costs cannot be paid by the State Board of Health.

ELEVATORS

February 6, 1952—052-31.

FLORIDA INDUSTRIAL COMMISSION—ELEVATORS, ETC.— INSPECTION—EXEMPTIONS

QUESTIONS: 1. Is an "Inclin-ator" or "Stair-Travelor" such as described in your letter, included within the definition of the term "elevator" contained in §399.01, F.S.?

2. If the answer to the first question is in the affirmative, is the Industrial Commission authorized and required to regulate and inspect the installation and operation of such equipment when installed in places of limited public exposure, such as in banks, fraternal clubhouses and apartment houses, or in places where only employees of the owners have access to the same?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

As described in your letter, an "Inclin-ator" is a mechanism placed on the stairway of a home, apartment house, or other building, consisting of a car or chair supported on a roller truck running within a special type of steel channel along one side of the stairway which is used for transporting persons up and down the stairs by a small electric power unit. A "Stair-Travelor" is an essentially similar device which also is installed along the side of a stairway to transport personnel from one level of a house or building to another by mechanical methods.

It is my opinion that the subject equipment clearly falls within the definition set out in §399.01 (2), F.S., since it is undoubtedly an apparatus used in raising a platform vertically between permanent

rails or guides, and serves the identical purpose as a regulation elevator, escalator or other type of equipment. Accordingly, your first question is answered in the affirmative.

As to your second question, a perusal of Ch. 399, F.S., indicates that it applies to all elevators, except as provided in §399.13 and §399.14, which exempt elevators in municipalities where said municipalities have provided for the regular inspection of elevators and in hotels and in restaurants and apartment houses under the jurisdiction of the Hotel Commission where the Commission has provided for the regular inspection of same. All other elevators are included within the broad terms of the act, except those exempted by the above noted provisions and those exempted by the Industrial Commission pursuant to §399.02 (4).

I am informed that the prevailing custom has been to except elevators operating in private homes from such inspection. I can see no objection to this practice inasmuch as the public generally is not involved. However, I do not believe that this exception should be extended to elevator equipment in places where the public, even though a limited group thereof, might have access to the elevators, such as in banks, fraternal homes or clubs, and apartment houses, or even to places where only employees of the owners have access to the same. In such cases a portion of the public, albeit limited, would be exposed to defects in such machinery, and it would seem to be in the best interests of general safety and welfare that the Industrial Commission carry out its inspection duties in these instances.

Accordingly, it is my opinion that your second question is also properly answered in the affirmative.

CHAPTER XXVIII

SOCIAL WELFARE

DEPARTMENT OF PUBLIC WELFARE

December 16, 1952—052-327.

DEPARTMENT OF PUBLIC WELFARE—FRAUD— WRITTEN REPORT REQUIRED—§409.36, F.S.

QUESTION: Does §409.36, require the Department to report fraud to the proper prosecuting officer, and if so, in what form should the report be made?

To: Honorable Sherwood Smith, Director, Department of Public Welfare, Jacksonville, Florida:

Among other things, §409.36 of the Statutes requires all officers, employees and persons having any duty with respect to the administration or enforcement of the Welfare Act to make a written report, with complete details and facts, of all cases of fraud connected with the obtaining or attempt to obtain public aid, etc. as set out in greater detail in the statute. The statute makes it a misdemeanor to obtain or attempt to obtain such aid fraudulently, and also makes it a misdemeanor for any person required to make the report not to do so.

While the statute is silent as to the duties of the Department of Public Welfare after it has received these reports, it is my opinion that there is an implied duty to promptly transmit the information contained in such reports to the proper prosecuting officer for criminal action and to give the prosecuting officer such assistance as may be reasonably requested.

July 17, 1951—051-219.

DEPENDENT CHILDREN—AID—SUPPORT—LIABILITY

QUESTION: Does §12 of Ch. 26937, Laws of 1951, contemplate a civil proceeding under:

(a) Chapter 65, F. S., and particularly Sections 65.10 and 65.14 relating to provisions for support of children, custody, etc.; or

(b) Where the child is illegitimate, proceedings under the bastardy laws recently adopted; or

(c) Any other appropriate civil proceeding whereby a delinquent parent is proceeded against to force the support of a child or children.

You also inquire:

Whether the proceedings referred to in Section 12 contemplate where no available civil proceeding can be had because the father is beyond the jurisdiction of the courts, or otherwise, and should be

instituted or instigated by the person or persons who make application for such dependent child's support a prosecution under §856.04, F.S., relating to the desertion of a wife and/or children, which defines such offense as a felony?

To: Honorable David J. Lewis, Attorney, State Department Public Welfare, Jacksonville, Florida:

The purpose of §12 of Ch. 26937, Laws of 1951, was to require those seeking aid for a dependent child to use available legal procedures to force persons liable for the child's support to supply it before calling on the State for financial aid. In other words, the State is unwilling to grant aid to a dependent child when the assistance can be supplied by a parent or other person who has the duty to support the child. Considerately, the statute authorizes aid pending the institution and prosecution of legal action to require support by those liable therefor. Accordingly, §12 does contemplate such civil proceedings as are mentioned in your questions a, b, and c.

The Section does not contemplate institution of prosecution under §856.04 of the statutes or other criminal statute. As pointed out in your letter, our court has repeatedly held that the last named section may not be used as a means of obtaining support. The same rule would apply to any other criminal action.

August 17, 1951—051-279.

DEPENDENT CHILDREN—AID—APPLICANTS—SUPPORT—LIABILITY

QUESTIONS: (1) What are the duties of the applicant for aid to dependent children, the Department of Public Welfare, and prosecuting officers of the county, under §12, Ch. 26937, Laws of 1951?

(2) Are those duties of the prosecuting officers mandatory?

To: Honorable David J. Lewis, Attorney, Department of Public Welfare, Jacksonville, Florida:

In the administration of the State's welfare program, it was found that sometimes applicants for aid might have obtained aid from private persons by resorting to legal action to enforce support of the child, but neglected to do so. The Legislature was unwilling to continue to support children when there was someone within reach of its civil process who might under the law be required to support the child and, therefore, they made State aid contingent upon the applicant's using whatever means might be available to require such private aid to the indigent child.

Usually, such applicants would not have sufficient means to employ counsel, and the Legislature, therefore, required that, if necessary, they go to legal aid societies or similar organizations which supply legal assistance to the indigent; and, in the absence of such legal aid associations, the Legislature imposed on certain prosecuting officers the duty to perform that service for the applicant. The ultimate beneficiary of such action is the State.

Section 12 of Ch. 26937, in my opinion, imposes the following duties:

(1) On the applicant, to institute and diligently prosecute civil action against anyone who is liable for the support of the child, by private counsel, if the applicant is financially able to employ counsel or if attorney's fees are recoverable in the action. In the event this is not possible, it is the duty of the applicant to give to the Department of Public Welfare, and any other official aiding or participating in the case all information, evidence, etc., which may be helpful in the prosecution of the action, and to stand ready at all times to do whatever can be done to aid its prompt disposal.

(2) If the applicant has no means of employing an attorney, it is the duty of the Department of Public Welfare to direct the applicant to any legal aid society which might be willing to act, and to assist the legal aid association or attorneys who may be handling the case, in whatever manner may be practicable within their means and facilities, but without assuming responsibility for the prosecution of the action.

(3) When an applicant for aid to a dependent child requests his assistance in prosecuting civil action against a person liable for the child's support, it is the duty of the prosecuting officer to undertake the prosecution of the case, whether the request comes from the applicant directly or through the Department of Public Welfare. As pointed out above, the State is the ultimate beneficiary of such action and it is the mandatory duty of the prosecuting attorney to promptly take such action and to prosecute it diligently to a conclusion.

I think the act contemplates honest, earnest, and wholehearted cooperation between the applicant, the Welfare Department, and the attorney handling the case, whether he be private attorney, legal aid society attorney or prosecuting attorney, all of them being mindful of the purpose of the statute, that is, to save as much of the State's welfare appropriation as possible, in order that those most needy and who have no other possible source of income may be better provided for.

November 2, 1951—051-395.

DEPENDENT CHILDREN—AID TO CHILD BORN IN NONRESIDENT STATE

QUESTION: "In view of the conflict between the Federal and State laws, is a child born outside of the State to a Florida resident eligible for assistance if the other requirements of eligibility are met?"

To: *Honorable Sherwood Smith, Director, Department of Public Welfare, Jacksonville, Florida:*

Section 15 of Ch. 26937, Laws of 1951, in so far as it is pertinent to your question, makes eligible a child who:

"Was born within the State within one year immediately preceding the application, if its mother has resided in the State for one year immediately preceding its birth."

The pertinent part of the Social Security Act requirement for participation in Federal funds, prior to the 1950 amendment of that Act, required eligibility to include a child who:

"Was born within the State within one year immediately preceding the application, if its mother has resided in the State for one year immediately preceding the birth."

The seeming conflict arises from the omission of the words "within the State" from the 1950 amendment of the Social Security Act (Sec. 321 (c), Public Law 734, 81 Congress), which now reads:

"Who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth."

The amendment of the Social Security Act is not effective until July 1, 1952.

You will observe that the Florida provision was exactly the same as that of the former Social Security Act. It has been the fixed policy of the State to comply with the reasonable requirements of the Federal Social Security Act, in order to become eligible for Federal welfare funds, and to conform our statutes to Federal acts making grants to the states. In re-writing the Public Welfare chapter, it is probable that the 1951 Legislature overlooked the 1950 change in the Social Security Act, that is, the omission of the words "within the State."

Undoubtedly, the elimination of the words "within the State" from the Federal Act was due to the absence of any sound reason for denying relief because of the birth of a child outside of the state of the residence of its mother. Certainly, there was no intention to deny aid to a child because the mother may have gone to the home of her parents or other relatives in another state, or to a hospital or maternity home in another state, for the birth of her child; or because the mother, at the time of the birth of her child, may have been out of the state for any reason other than one which included or resulted in abandonment of the state as her residence.

The words omitted from the amended Federal Act were, I believe, meaningless so far as the ultimate intent of Congress and the Florida Legislature is concerned. With the elimination of those words, the law still requires that the mother, or other custodian of the child, have been a resident of the State for one year immediately preceding the birth of the child. It seems reasonably certain that nothing more was ever intended by the Congress or by the Florida Legislature.

It is my opinion that a child eligible under the quoted provision of the amended Social Security Act will be eligible under the Florida Act.

November 15, 1951—051-414.

DEPENDENT CHILDREN—AID—SUPPORT—LIABILITY

QUESTIONS: 1. Since the Act makes no provision for the payment of court costs incident to legal action, who is to pay the costs?

2. Where there is no legal aid society or comparable organization in a county, which of the officers named in said §12 has the primary duty of carrying out its provisions?

3. Does the fact that the county prosecuting attorney may be acting under the provisions of §§125.03 and 125.04 of the F.S. except him from the provisions of said §12?

4. Is not \$856.04, F.S., the only practical solution to forcing a father to support his dependent children?

5. What remedies of a civil nature are available against a delinquent father in the matter of the support of his children?

6. If, under the statute, it becomes the duty of the prosecuting officer to take legal action, what compensation, if any, is he entitled to and from whom?

7. Is the act of the Legislature imposing these additional duties on prosecuting officers constitutional?

8. Can the Legislature lawfully impose these additional duties upon the county prosecuting officer without providing him compensation for his services and additional office expense incident to the handling of the additional work?

To: Honorable Sherwood Smith, Director, State Department of Public Welfare, Jacksonville, Florida:

Section 12, Ch. 26937, requires that a person seeking aid for dependent children must take appropriate legal action to require support of the dependent children by persons liable therefor, imposes certain duties on county prosecuting attorneys who have charge of the prosecution of misdemeanors in the county, and places certain duties on the Department of Public Welfare.

In my opinion of August 17, 1951, to your attorney, #051-279, I discussed fully the duties of your agency, prosecuting officers, etc. I suggest that you refer to that opinion. There is little that can be added to the attempt there made to explain the purpose, intent and the working of the act. However, the above questions may be answered as follows:

The court costs should be paid by the applicant. If the applicant is unable to pay the court costs, you then have the question of whether your agency might advance those costs as a part of your cost of administering the program. If the Social Security Administrator agrees to contribute to the advancement of court costs, I see no reason why you could not use your funds for that purpose in proper cases. I think that is a matter to be worked out between you and the Social Security Administrator and, if possible, an agreement reached as to what class of cases and under what circumstances such costs may be advanced. Clearly, the prosecuting officer, when he assumes any of his duties under the act, is not required to advance or be responsible for court costs.

Where it becomes the duty of the prosecuting officer to assist in these proceedings, the statute places that duty upon that county prosecuting officer who has charge of the prosecution of misdemeanors in the county. In his absence, disability or disqualification, the duty falls upon the State Attorney of the circuit.

If the county prosecuting officer acting under §§125.03 and 125.04 of the statutes is charged with the duty of prosecuting misdemeanors in the county, he is not excepted from the provision of the statute.

Another question refers to §856.04, F.S., which section makes it a criminal offense for a parent to withhold support from his minor children, when required by law to care for and support them. Whether a criminal action, under said §856.04, F.S., should be instituted is a matter for determination by the proper prosecuting authority and not by the welfare authorities. Attention is called to the several cases of the Supreme Court of this State wherein it was pointed out that proceedings under said §856.04, should not be used as a substitute for civil proceedings to compel a parent to contribute to the support of his children. *Chavers v. State, Fla.*, 193 So. 537; *Floyd v. State, Fla.*, 155 So. 794; *McBryer v. State, Fla.* 150 So. 736. The Court in these cases did not hold that a person guilty of violating the statute should not be prosecuted, and we should not ignore the fact that prosecution, where the circumstances come within the purview of the statute, may be very effective in preventing neglect of children by their parents. If a prosecution is had under this section civil proceeding contemplated by §12, Ch. 26937, Laws of 1951, may be unnecessary.

Section 12 of said Ch. 26937 was intended to require that children, who legally should be supported by parents or persons in loco parentis able to support them, should not be supported from public welfare funds; however, it was never intended by said §12 that children suffer until funds are obtained from their parents through legal process. In proper cases doubtless welfare funds may be used for the support of such children pending the termination of such legal proceedings. Where parents are financially unable to support their children and it is clear that no funds for support may be obtained through legal proceedings it would seem to be a waste of funds to proceed against them legally when nothing can be accomplished by such proceedings. Doubtless this fact should be ascertained by the Welfare Board before it requires that proceedings be brought as required by said §12 of Ch. 26937.

Another inquires what civil remedies are available. That will depend on the facts and circumstances in each case. In cases of illegitimacy, bastardy proceedings might be available under the new statute on that subject, Ch. 26949, Laws of 1951. In other cases, action may be possible under §65.09, et seq. There may be cases where an unsatisfied divorce decree providing for maintenance of children might be revived or enforced. In some instances, there will be no practical remedy. There will be many cases where there is no one who can be required to support the child, and many other cases where the person or persons liable for the support are hopelessly insolvent or physically or mentally or otherwise incapable of supporting the child. The law does not require a futile action. I think your Board has the authority in each case to determine, after a thorough and complete consideration of all the facts and circumstances, whether there is any likelihood of success in obtaining support for the child or children in question and, if the determination is in the negative, I do not construe the statute as requiring any action. In all such cases the facts and a definite

finding based upon those facts should be entered in your records.

The Legislature intended that anyone who is liable for the support of children for whom aid is requested be required to support those children, and any available legal action likely to result in accomplishing that purpose should be taken. It did not intend the expenditure of costs or services by anyone when a fair consideration of all the facts may indicate that legal action would be unproductive.

This office does not ordinarily pass upon the constitutionality of a statute. Indeed, it is usually the duty of the office to uphold the constitutionality of an act of the Legislature where it is questioned. The Legislature frequently adds to the duties of public officers, sometimes with additional compensation, sometimes without, and the common rule of construction is that where additional duties are given without provision for additional compensation, no additional compensation is to be paid, however, there is nothing in the statutes which would appear to prevent the Circuit Court, in proceedings under said §12 of Ch. 26937, from awarding attorney's fees to the attorneys (including prosecuting attorneys and county attorneys mentioned in the statute) representing the children in proceedings required by said section for their support. Section 65.16, F. S., permits the Circuit Court in its discretion to allow a divorced wife suit money, and reasonable attorney fees in proceedings for enforcing an order for payment of alimony or support of children, as the circumstances of the parties and nature of the case seems fit and just. It has also been held that a superintendent of the poor was allowed expenses incurred by him in the employment of counsel to conduct a bastardy proceeding (43 Am. Jur. 154). Whether or not such attorneys' fees may be awarded is a legal question to be finally determined by the courts; however, we feel that such fees may be awarded.

A prosecuting attorney has today forwarded to this office a letter from your Case Supervisor in District 12, part of which reads as follows:

"We have no alternative but to begin rejecting applications and cancelling grants of those persons who are unable to present proof in thirty days that action has been started to obtain support."

I presume that statement must be based upon action of the Department of Public Welfare, because there is nothing in the statute which requires the cancellation of a grant or rejection of an application if the applicant does not begin action within thirty days. As I have just pointed out, there will be many cases where no action can be brought or where it would be utterly useless and a waste of time and money to bring the action. That is not required by the statute. Furthermore, thirty days might, in many cases, be insufficient time within which to get the action started. I am not questioning your Board's administrative policy; I am merely pointing out that §12 of Ch. 26937 does not require that.

Since dictating the above, I have been served with a copy of a suit for declaratory decree which has just been filed in Bay County and which apparently questions the constitutionality of

§12 of Ch. 26937 in so far as it imposes duties upon the county attorney of that county; it also asks the court to determine whether that county attorney is required to institute civil actions against persons liable for the support of dependent children and to determine who would be liable for court costs in such cases. Obviously, what is said in this opinion is subject to any determination by the court in that case, or any other court of competent jurisdiction.

December 6, 1951—051-446.

ATTORNEYS—PHYSICIANS—SALARY RESTRICTIONS

QUESTION: Does the salary restriction clause in §32 of Ch. 26937, Laws of 1951 (§409.111, F. S.) which prohibits the payment of salaries over a certain rate apply to attorneys' and physicians' fees for services, paid on a year-round contractual basis?

To: Honorable Sherwood Smith, Director, State Department Public Welfare, Jacksonville, Florida:

The salary restriction referred to reads as follows:

"No employee other than the Director and one assistant shall be paid in excess of four hundred fifty (\$450.00) dollars per month and in no event shall more than seven of such employees receive more than three hundred twenty-five (\$325.00) dollars per month."

It is my opinion that the restriction applies to anyone who is paid a fixed amount by the month or year or other period of time, whether his services be of a professional nature or otherwise. Your question is, accordingly, answered in the affirmative.

August 14, 1952—052-253.

OLD AGE ASSISTANCE—AID TO BLIND—FEDERAL GRANT INCREASES

QUESTION: May the State Board pass on to those applicants or recipients who are eligible the Federal increase in grants provided by the 1952 amendment to the Social Security Act, H. R. 7800, Public Law 590 82nd Congress, Ch. 945, Second Session even though the maximum allowance should exceed the maximum set out in §§409.16 and 409.17, F. S.?

To: Honorable Sherwood Smith, Director, Department of Public Welfare, Jacksonville, Florida:

You refer to an opinion of my predecessor dated September 11, 1946, No. 046-375. In that opinion the former Attorney General construed a 1946 amendment of the Social Security Act which was substantially identical in its application with the 1952 amendment. He discussed at some length the purpose of the additional grant of the amendment and, more particularly, the provisions of the State statute and the policy of the Legislature in regard to passing on to recipients funds received from the federal government for that purpose by the Welfare Board. I agree with his conclusion in that case that your Board could lawfully pass on to eligible recipients the additional federal funds supplied by the

1946 Social Security amendment, even though it resulted in exceeding the maximum set up in the Florida statute, provided all of the excess was from federal funds and none from state funds. The same rule would apply in the application of the 1952 amendment of the Social Security act. Accordingly, your question is answered in the affirmative.

BLIND PERSONS

December 31, 1951—051-483.

PUBLIC WELFARE—BLIND PERSONS—AID— ELIGIBILITY—RESIDENCE REQUIREMENTS

QUESTION: Does a person who has been receiving aid to the blind previous to his twenty-first birthday but who has not lived in Florida five years of the last nine years, according to State requirement for a recipient other than a child, become ineligible upon becoming an adult?

To: State Department of Public Welfare, Jacksonville, Florida:

The 1951 State Welfare Act, Ch. 26937, §14 (1), states the residence requirements for eligibility for aid to the blind.

The residence requirement of the statute and other similar statutes relating to public assistance are designed to exclude non-residents who might come into the State for the primary purpose of immediately claiming support and maintenance by the State. The State has no obligation to such nonresidents and the statutes merely provide that the State shall not assume any such obligation until the applicant shall support the good faith of his intention to become a citizen of the State by residence within the State for the required period. Residence for the statutory period is accepted by the State as proof of the applicant's intention to become a permanent resident, and therefore, entitled to its bounty.

While we think it necessary to state the foregoing principles for the purpose of clarifying the issue, nevertheless the question we are considering relates not to a blind adult resident who has not been receiving aid, but to a blind adult resident who was eligible for and has been receiving aid during his minority up to the time of his majority and requires continuance of blind aid without break. In the case of such latter person, the rule under the statute appears to be that despite the fact he has reached his majority his eligibility for aid became fixed by the statute while he was a minor, that is before he reached the age of twenty-one years. Thus as a minor he was eligible either by having resided in the state for one year prior to the application for aid or was born within the state within one year immediately preceding the application of a mother who resided in this state for one year immediately preceding his birth. Of course, should such a person while receiving such aid as a minor actually remove himself from the state and become ineligible he would not regain eligible status upon returning to the state after he becomes an adult, but would be subject to the conditions for eligibility set forth in the first part of the quoted statute. Those conditions are, residence in the state for at least five years of the nine years immediately preceding the application and the five years must include the one year

immediately preceding the application. Accordingly, it is my opinion that a blind child who has been eligible and the recipient of aid to the blind does not lose his eligibility upon reaching the age of twenty-one, although he may not have resided in the State for five of the immediately preceding nine years.

HOUSING AUTHORITIES LAW

March 20, 1951—051-59.

HOUSING AUTHORITIES—REDEVELOPMENT PROJECTS —MUNICIPAL LIMITS—RESTRICTIONS

QUESTION: Does §11 of Ch. 23077, Laws of 1945, as amended by Ch. 26362, Laws of 1949, relating to redevelopment projects by housing authorities, restrict the application of Ch. 23077, Laws of 1945, to the municipal limits of the cities concerned, so that unincorporated areas outside the city limits could not obtain the benefits of such Act?

To: Honorable J. T. Knight, Executive Director, Housing Authority, City of Miami:

Chapter 23077, Laws of 1945, is, in effect, a supplement to Ch. 421, F. S., known as the Housing Authorities Law. Ch. 23077, Laws of 1945, grants the housing authorities established under Ch. 421 greater powers than those authorized by the basic statute, such as making lands in a redevelopment project available for use by private enterprise, eliminating certain restrictions contained in §§421.09 and 421.10 of the general statutes, and other similar extensions of authority.

Chapter 421, F. S., may be made operative in any city in the state having a population of more than 2500 persons, by virtue of the definition of "city" contained in §421.03, F. S.

It is clear that Ch. 421, the basic act, applies not only within the territorial boundaries of the city concerned, but the housing authority of the city may also extend its jurisdiction to an adjacent 5 or 10 mile area outside such city, depending on the population of the city.

Chapter 23077, Laws of 1945, however, originally applied only to municipalities of not less than 60,000 population, by virtue of §11 thereof, which figure was changed to 14,000 by Ch. 26362, Laws of 1949. It is the language of this §11 which gives rise to your question.

Your question is whether the wording of this §11, especially the phrase "shall apply to and be effective and operative only in those municipalities . . . (having the required population)", means that such act could be applicable only within the territorial limits of a city, or whether the language was merely meant to indicate the minimum size of a city which could take advantage of the law, and if the city met such population figure, the housing authority established could exercise jurisdiction under Ch. 23077 in the adjacent areas in the same manner as permitted under Ch. 421, F. S.

From an analysis of the various statutes here involved, I am inclined to the view that the intent of Section 11 was simply to

place a minimum population limit on the city which could qualify under the act, and was not meant to restrict the operation of such housing authority to the municipal boundaries.

As previously stated, Ch. 23077 is essentially an addition and supplement to Ch. 421, F. S. Section 2 of Ch. 23077, listing the work authorized to be carried out by the housing authority under such law, is prefaced by the following pertinent phrase, "any housing authority . . . now or hereafter established pursuant to Ch. 421, F. S., and any amendments thereto, . . . may carry out any work or undertaking (hereafter called a 'redevelopment project') *within its area of operation*." Since this specifically refers to Ch. 421, F. S., and uses the term "area of operation," it seems to follow logically that the area of operation meant was that defined in Ch. 421, which, as previously stated, includes unincorporated areas adjacent to the city limits.

Section 3 of Ch. 23077, Laws of 1945 seems to be a clear indication that the Legislature intended this law to have the same scope as Ch. 421, and for the housing authorities established thereunder to have the same broad powers in connection with redevelopment projects authorized by Ch. 23077 as were granted them under Ch. 421, F. S., for slum clearance and housing projects.

In summary, then, it seems from a reading of the entire act that the sole purpose of Ch. 23077 was to enlarge the powers of housing authorities granted by Ch. 421, and in no sense to place a restriction on such powers, except that §11 requires that the city desiring to come under Ch. 23077 must have a population of 14,000 rather than 2,500. In other words, I do not believe that it was intended to restrict the "area of operation" of the housing authority once established, but only to set a basic population figure for the cities which could undertake such projects.

Hence, it is my opinion that the provisions of §11, Ch. 23077, Laws of 1945, as amended, do not necessarily confine the "area of operation" of a housing authority within the municipal limits of the city, and that, therefore, your question should be answered in the negative.

CHAPTER XXIX

LABOR

WORKMEN'S COMPENSATION LAW

February 9, 1951—051-29.

WORKMEN'S COMPENSATION ACT—"STREET RISKS"— ACCIDENTS EMPLOYEES' BENEFITS

QUESTION: Would an employee be entitled to compensation benefits under the Florida Workmen's Compensation Act when such employee, while on the streets of a city engaged in the performance of his duties, was injured by a stray rifle bullet from an unknown source?

To: Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:

Since the circumstances presented in your question raise a legal problem that has not been reviewed by the Florida Supreme Court, you request my advice as to whether or not the employee concerned would be entitled to workmen's compensation benefits for the injury received as a result of the accident described.

The real question involved is whether or not the injury described above was one "arising out of and in the course of employment" as required by §440.09, F. S. There is, of course, a distinction between "arising out of" and "arising in the course of" employment. The words "in the course of" employment have reference to time, place and circumstances, while the words "arising out of the employment" refer to the origin or cause of the accident. See Vol. 4, Words and Phrases, p. 107, et seq. Both requirements must be satisfied before recovery may be had. In so far as "in the course of employment" is concerned, it seems well settled that an injury occurring within the period of the employment at a place where the employee may reasonably be and while he is reasonably fulfilling the duties of his employment or engaging in doing something incidental to it, is an injury occurring in the course of the employment. *Fidelity & Casualty Co. of N.Y. vs. Moore*, 143 Fla. 103, 196 So. 495; *Sweat vs. Allen*, 145 Fla. 733, 200 So. 348; *Ft. Pierce Growers Association vs. Story* 158 Fla. 192, 29 So. 2d 205. In the instant case, it is assumed that the accident occurred in the course of the employment. Hence, the prime question for decision is whether or not the other requirement was satisfied, i. e., did the injury "arise out of" the employment? This presents a more complex matter.

It is the general rule that in order for an injury to arise out of the employment, there must be some casual connection between the injury and the employment, or it must have had its origin in some risk incidental to or connected with the employment, or it must have flowed from it as a natural consequence. *Sweat vs. Allen*, supra. Furthermore, in stating the general rule, our

Supreme Court has said that for an injury to arise out of the employment, it is necessary for the employee to be exposed to a danger, in the performance of the duties for which he is engaged in the manner required or contemplated by the employer, materially in excess of that to which people commonly in that locality are exposed when not situated as he is when thus performing his services. *Alexander Orr, Inc. vs. Florida Industrial Commission*, 129 Fla. 369, 176 So. 172. Strict application of this general rule to the instant case would probably deny the subject employee any recovery under the workmen's compensation act; inasmuch as there appears no showing of a direct or indirect casual relationship between the employment and the accident. Your letter recites that there was no nearby rifle range, shooting gallery or other factor present that could have apprised the employer of the danger of one of his employees being hit by a stray bullet. Therefore, it would be difficult to prove that the employee was anymore exposed to a danger in excess of that to which other people in that locality were similarly exposed, within the scope of the general rule stated above.

However, since the time of the initial enactment by the various states of workmen's compensation laws, there has been a growing tendency to give a very liberal construction to the phrase "arising out of and in the course of employment."

In this connection, there has developed a long line of court decisions in the category of what are known as "street risk" cases. Under this theory of "street risks", the courts of many states have held that where employees in the course of their duties are required to be in or travel over streets and highways, the hazards of injury are materially increased and accidents suffered while in the streets have been held as arising out of the employment. Thus, a salesman traveling by automobile encounters the risk of being stopped by officers with firearms, (*Wold vs. Chevrolet Motor Co. Inc.*, 179 N. W. 219); an employee required to travel by train who was injured while at a railway station by a bullet fired by a police officer in pursuit of a criminal upon an adjacent street was awarded compensation; (*Frigidaire Corp. vs. Industrial Accident Commission*, (Cal) 283 P. 974); and an employee, in the act of sweeping in front of his employer's building, killed by gangsters along the street, shooting indiscriminately, was held to be protected by the compensation laws (250 N. Y. 543, 166 N. E. 318). These accidents, and others where compensation has been awarded to employees whose duties require them to be upon public streets and highways, are attributed to the risks and hazards originating upon and connected with the use of public streets, and have been held to arise out of the employment. As stated in *Katz vs. A. Kadans and Co.* 232 N. Y. 420, 134 N. E. 330, "If the work itself involves exposure to perils of the street, . . . the employee passes along the streets when on his master's occasions under the protection of the statute . . . The danger must result from the place to make it a street risk, but that is enough if the workman is in the place by reason of his employment, and in the discharge of his duty to his employer." Further, it has been said that it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under

the like conditions. See 71 C. J. 752, Note 20 (b). See also 51 A.L.R. 509 and 80 A.L.R. 126.

In addition to this doctrine of so-called "street risks", it is also important to note that the courts of this and other states are tending to interpret workmen's compensation laws more and more liberally and to emphasize the basic rule that workmen's compensation laws should be construed liberally in behalf of the claimant and all doubts resolved in his favor, in order to extend maximum protection to the employee and to his family.

An analysis of the cases indicates that in recent years the courts have, if at all possible, found some casual connection, however incidental and remote it may be, between the employment and the accident in order to hold that the injury did arise out of the employment. For example, in the case of an employee struck by lightning, our Supreme Court justified the awarding of compensation on the basis that the employee concerned was struck by the lightning while seeking shelter under a tarpaulin erected by the employer, which the court held to be sufficient to indicate that the accident arose out of the employment (*Ft. Pierce Growers Association vs. Story supra*). In *Alexander Orr, Inc. vs. Florida Industrial Commission*, *supra*, the Supreme Court found that an employee engaged in laying sewer pipes was exposed to a greater hazard of sunstroke and heat exhaustion than were other persons in the same vicinity who were playing golf, bathing or engaging in other activities, even though evidence was introduced to show that the temperature was not excessive considering the locality and the season of the year. This modern tendency to find a causal connection between practically any accident occurring in the course of employment so as to fulfill the requirement of "arising out of" the employment is ably summed up in a recent California case, *Industrial Indemnity Co. v. Industrial Accident Commission*, 214 P. 2d 41. In this case, the California Supreme Court held that where a waitress was accidentally killed by a shot fired at a customer by his wife while the waitress was standing at the cash register in the restaurant, the accident arose out of the employment. In its decision, the California court analyzed the background of the workmen's compensation laws and expressly recognized the modern trend toward awarding compensation wherever possible. In examining the "street risk" cases, discussed above, the California Court said that most of the decisions awarding compensation were really based upon the fact that had the employee not been where he was in the course of his duties, he would not have been injured. The modern test, in cases where the accident originated from a force disconnected with the employment, is that it is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes, according to the California Court.

Accordingly, it would appear that this line of "street risk" decisions in other states, coupled with the unmistakable trend toward liberalization of awards under the compensation laws, would provide sufficient authority to answer your question in the affirmative. Based on the foregoing, then, it is my opinion that the Commission would be justified in awarding compensation to the employee injured under the circumstances outlined in your letter.

April 7, 1952—052-116.

TOBACCO GROWERS—"AGRICULTURAL FARM LABOR"— DEFINITION

QUESTIONS: 1. If a firm grows tobacco on its farm property, has the farm laborers to harvest and transport the crop to its warehouse at another location, uses the same farm labor to handle and process the tobacco, transporting them to and from the farm at the end and beginning of each work day, would that firm be engaged in "agricultural farm labor" as contemplated in §440.02, F. S.?

2. If a group of tobacco farmers form a cooperative, the cooperative owning warehouse and equipment and leasing space back to the farmers, the individual co-op members bring their tobacco and their own labor in from their respective farms to handle and process only their own tobacco, would the cooperative be liable in case of injury for the payment of compensation to the labor engaged in processing the tobacco within its warehouse? Would each individual farmer be liable for the payment of compensation in case of injury to one of his employees while engaged in processing tobacco in the warehouse owned by the cooperatives?

3. If a firm grows tobacco, buys other tobacco from farmers, and processes the tobacco from both sources in a packing house located at a place apart from that at which the tobacco is grown, would this firm be engaged in "agricultural farm labor"?

4. If a firm grows no tobacco but processes tobacco which it purchases from other persons, will this firm be engaged in "agricultural farm labor"?

To: *Honorable Rodney Durrance, Director, Florida Industrial Commission; Workmen's Compensation Division:*

First let me say that the facts submitted in each of the foregoing questions are insufficient in detail to permit or warrant a definite and unqualified answer to them. However, I will attempt to answer each of the questions, keeping in mind at all times that when said questions refer to such terms as "process, processing, or processes the tobacco" it means cleaning, curing, grading, and otherwise preparing a crop of tobacco for market or farm sale and all other normal procedure customarily followed by growers in the production of tobacco crops, as distinguished from manufacturing finished products such as cigarettes, cigars, chewing tobacco, pipe tobacco, etc.

In response to your first question, I think it is clear that the firm would be engaged in "agricultural farm labor". It is my opinion that the phrase "agricultural farm labor", as used in §440.02, F. S., means and refers to any agricultural pursuit, and may properly include every process and step taken which is necessary to the completion of a finished product. (See 58 Am. Jur. 647; *Cook v. Massey* 38 Id. 264, 220 Pac. 1088, 35 A.L.R. 208). Accordingly, this question is answered in the affirmative.

In response to your second question, it is apparent that each farmer or grower involved uses only his individual employees to

handle and process his tobacco. As I understand the situation here involved, the farmer or grower is doing nothing more than acquiring the use of machinery and warehouse space through a cooperative plan with others engaged in a like pursuit. To my way of thinking, it makes no difference whatsoever as to what plan or method a tobacco farmer or grower may use in order to obtain the use of machinery, equipment and warehouse space for the purpose of processing his own tobacco, so long as the work is being performed for him and so long as the work is an incident to, and intimately connected with, the ordinary farming operations as distinguished from manufacturing or commercial operations. This question is answered accordingly.

In response to your third question, let me say that if a firm grows the major portion of its own tobacco and the processing thereof is carried on as an incident to its ordinary farming and tobacco growing, as distinguished from a manufacturing or commercial operation, the mere fact that the firm occasionally purchases small quantities of tobacco to be processed along with its own tobacco would not necessarily take its operations or activities out of the provision of "agricultural farm labor". However it must be borne in mind that if the firm's processing is carried on independent of its farm operations and not as an incident to ordinary tobacco farming it would be engaging in an industry and accordingly, it could not be classified as "agricultural farm labor". This question is answered accordingly.

In response to your fourth question, it is obvious that the firm is engaged in industry and not farming. The mere fact that a firm processes tobacco procured from persons engaged in Agricultural farming does not bring its operations and activities within that of other firms engaged in "agricultural farm labor". Here the firm is engaged in "processing" not "farming". (See *H. Duys and Co. v. Tone*, 5 At. 2d 23 and cases therein referred to; *Keeney v. Beasman*, 169 Md. 582, 182 Atl. 566; 35 A.L.R. 208). Accordingly, this question is answered in the negative.

Because of the varying phraseology of the statutes of the several states, the many different kinds of work involved, and the conflict in the decisions upon statements of fact apparently similar, it is impossible to evolve a general rule which might be said to be generally applicable in workmen's compensation cases. The most that can be said is that where a firm is carrying on activities which are ordinarily incidental to farming as that occupation is generally understood is within the purview of the exclusion of "agricultural farm labor". Agricultural, broadly defined, includes not only cultivation of the soil and its fruits, especially if in an area of such size and character as to be regarded as a farm, but also such processes or steps as are necessary and incident to the completion of products therefrom for consumption or market. That is to say, activities connected with the preparation of farm products for use or sale which are carried on upon the farm or in intimate connection with it are in nature "agricultural farm labor" in the common conception of that term.

Processing tobacco means cleaning, grading, curing and otherwise preparing it for market as part of the normal procedure in the production of a tobacco crop. It has nothing to do with the

manufacture of products made from tobacco, such as cigars, chewing tobacco, cigarettes, pipe tobacco and snuff. The mere processing of a tobacco crop, without raising any part of the crop would seem to separate such processing from tobacco farming to the extent that it would lose its sequence as a step in the production of a tobacco crop by agricultural farm labor.

It must not be overlooked that where activities connected with the preparation of farm products for use or sale have become specialized and removed from the farm to such an extent that they are no longer intimately connected with it, then such activities must properly be regarded as industrial in nature rather than agricultural. (See 2 Am. Jur. 395; 3CJS Agriculture, §1, page 366; Chudnov v. Board of Appeals, 154 Atl. 161; Keeney v. Beasman, supra.).

December 21, 1951—051-479.

**WORKMEN'S COMPENSATION ACT—EMPLOYEE—
EMPLOYER RELATIONSHIP—STOCK-CAR DRIVERS
—CAR OWNERSHIP**

QUESTION: Are stock-car racing drivers covered by our Workmen's Compensation Act (Ch. 440, F. S.) as employees of the track owners, where the drivers either furnish their own car or use some one's other than the track owners and where the drivers receive remuneration by either (1) a certain guarantee, or (2) prize money for placing, or (3) participate percentage wise in the gate receipts?

To: Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:

In all these questions of the coverage of our Workmen's Compensation Law it must be kept in mind that while our Supreme Court has decreed that the Act should receive a liberal construction, *C. F. Wheeler Co. v. Pullins*, 152 Fla. 96, 11 So. 2d 303, it has also been careful to point out that the rule of liberal construction cannot be constrained to the point of extending it to employments not within its scope or intent. *Leon County v. Sauls*, 151 Fla. 171, 9 So. 2d. 461.

Since it is admitted that there is pecuniary consideration moving from the track owners to the drivers in one of the three methods stipulated above and since it may be fairly assumed that the drivers and the track owners have agreed beforehand under which of the three the drivers will be recompensed, it would seem that the drivers meet this definition, unless they fall within the excluding provisions of that section as "independent contractors" or "persons whose employment is both casual and not in the course of the trade, business . . . etc. of his employer." Thus the question of coverage under the Workmen's Compensation Act depends, it seems to me, upon whether the drivers are (1) independent contractors or (2) "casual employees" within the exclusions in §440.02 (2), F. S.

First, then, are the drivers employees or independent contractors? It appears to be generally conceded that no hard and fast rule may be stated to control the determination of this ques-

tion and that each case must stand on its own facts. *Magarian v. Southern Fruit Dist. et al.*, 146 Fla. 773, 1 So. 2d 858; *Rogers v. Barrett*, 46 So. 2d 490. To the facts in the *Magarian* case (*supra*) the Florida Supreme Court applied the test set out by §220 (2) Restatement of Agency which is as follows:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others are considered: (a) The extent of control which, by the agreement the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master servant. . . . The factors stated in Sub-section (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship.

Thus it will be seen that the two factors in the situation in question, i. e., ownership of the racing car and method of compensating the drivers, which would come under tests (e) and (g) above, respectively, are merely factors to be considered and not controlling of the question presented. They are, however, circumstances weighing against the existence of the relationship of employer and employee, and when taken with other factors not here given, may constitute such evidence as to preclude the existence of such relationship.

One of these other factors is (a), above, which our Supreme Court has said is the primary test in determining the relationship. See *Patton Seafood Co. v. Glisson*, 38 So. 2d 839. If the person for whom the service is rendered retains the right to control the manner in which it is to be performed, whether the right is exercised or not, the relationship is ordinarily held to be that of master and servant. Other elements may and often do effect the determination of the question, but that element persists as the most important. (71 C. J. 449.) Since your question presents no facts regarding this important element of control and since it is generally held that the decision in every instance must be controlled by the particular facts in each case, I am unable to make a categorical answer as to whether the race drivers are or are not covered by our Workmen's Compensation Law. However, for at least a partial answer to the question presented, I am of the opinion that, regarding the two factors stated in your question, i. e. ownership of the racing cars and the methods of remunerating the

drivers, although they would not *preclude* the drivers from coverage under the Act, they would be two factors which, by themselves, indicate no employee-employer relationship.

If, however, other facts not at my disposal bring the drivers within the status of employee, I do not believe they would be excluded from coverage as "casual workers" under §440.02 (2), F.S. Although their work would undoubtedly come within the definition of "casual" under subsection (3) of §440.02, subsection (2) requires that it be both casual and not in the course of the trade, business or profession of his employer. In *Sears Roebuck & Co. v. Pixler*, 140 Fla. 103, 196 So. 495, the court said, "if work pertains to employer's business and is within the general scope of its purpose, the employment is not 'casual' so as to preclude recovery of compensation even though the hiring be only for a short period of time." The race owner's sole business here is racing stock cars for profit and the work the drivers do is certainly within the general scope of that purpose.

Until such time as a particular factual situation arises and is presented to this office with all the details that must be present and considered in determining if any one person or group of persons is protected by the provisions of our Workmen's Compensation Law, the above conclusions are the only ones that can legitimately be made concerning your inquiry.

February 14, 1951—051-30.

FIC MEMBERS OTHER THAN CHAIRMAN—DUTIES— EXPENSES—LIMITATION

QUESTIONS: 1. Does §440.44, F.S., limit the payments which may be made to a member of the Commission, other than the Chairman, for travel, subsistence, and per diem allowance, for all duties and from all sources?

2. If the answer to the foregoing is "No," does §440.44, F.S., limit the payments which may be made to a member of the Commission, other than the Chairman, for travel, subsistence, and per diem allowances, which may be derived solely from the fund established in §440.50?

3. May all of the travel and subsistence allowance to which a member of the Commission other than the Chairman becomes entitled as a result of travel performed while on any official business of the Commission, be paid out of the Employment Security Administration fund established in §443.14 without regard to whether such official travel was performed in connection with Commission responsibility under the Unemployment Compensation Law?

To: *Honorable Raymond E. Barnes, Chairman, Florida Industrial Commission:*

The laws relating to expenses and allowances for members of Florida Industrial Commission other than the Chairman are set forth in §§443.11 and 440.44 F.S.

Florida Industrial Commission was created by Ch. 17481, Laws of 1935, the Workmen's Compensation Act. Originally, the

three members thereof consisted of a chairman and two cabinet members appointed by the governor (§44, Ch. 17481), the latter two members receiving no additional compensation for their services under the act. The personnel of the commission as it now exists was established by §15, Ch. 18413, Laws of 1947. Florida state employment service division and unemployment compensation division were created in the commission by §11, Ch. 18402, Laws of 1937. By subsequent legislation, the commission has been charged with the following additional supervisory and administrative responsibilities: child labor (Ch. 450, F. S., 1949); elevator design, installation, alteration and maintenance (Ch. 399, F. S., 1949); and private employment agencies (Ch. 449, F. S., 1949). These additional responsibilities are being administered in the workmen's compensation division of the commission. Thus, the commission has three divisions: employment service, unemployment compensation, and workmen's compensation.

In all this legislation, the compensation and expenses of the two members of the commission are controlled by §§443.11 and 440.44 F. S.

It is to be observed that the per diem and expenses provided by §440.44 for the two members of the commission other than the chairman are payable from the fund established by §440.50, a part of the workmen's compensation law; and that the compensation and expenses provided for these members under §443.11 (a part of unemployment compensation law) is derived by requisition or other request of the commission, following established federal laws and/or regulations, upon the Bureau of Employment Security, U. S. Department of Labor.

There is the clear provision in §7, Ch. 19637, Laws of 1939, mentioned above, that the compensation and expenses allowed under the act were "in addition to that provided under the terms of the Florida Workmen's Compensation Act." While, since the amendment provided by §10, Ch. 20685, Laws of 1941, such quoted provision has not been included in the wording of §443.11, it reasonably appears that compensation and expenses contemplated by such section are to be construed as in addition to the per diem and expenses provided by §440.44.

In view of the foregoing, in my opinion, the above questions are answered as follows:

(1) This question is answered in the negative. The position of Chairman of Florida Industrial Commission is a full-time one and under statutes pertaining thereto, such chairman has broad administrative powers and duties. The duties of the two members other than chairman of the commission are important positions, but not full-time ones, and, it is to be observed that their official duties as members of the Commission are restricted to those specifically defined in the several relevant statutes or reasonably incident thereto. These two members of the Commission, when actually engaged upon their official duties, as defined by relevant statutes, in connection with the powers of the Commission under the workmen's compensation division, are entitled to \$10 per day, plus actual traveling and subsistence expenses "necessarily incurred when actually engaged in their duties when away from their residence and so engaged," such per diem and expenses not to exceed \$1000 per member per

year, and payable out of the administrative fund described in §440.50.

It does not appear to have been the intent of state and federal legislation that "the necessary expenses in connection with these two members' duties under Ch. 443, as mentioned in §443.11, should be paid out of the administrative fund described in §440.50; hence, the \$1000 annual limitation with respect to per diem and expenses payable out of that fund does not relate to the expenses contemplated by §443.11.

It would appear that the time required by these two members of the Commission in the discharge of official duties under workmen's compensation division, on the one hand, and the time required for the discharge of such duties with respect to such other divisions, on the other, may be established with sufficient certainty and should be the basis for allocating the necessary expenses incurred by them under and as contemplated by §§440.44 and 443.11.

(2) It is apparent from the answer to the first question set forth in the opinion that the expenses of the two members of the Commission other than the Chairman in connection with the discharge of their duties under the Workmen's Compensation Division are payable from the fund described in Section 440.50, and that the expenses incurred in connection with the duties of these members under Chapter 443 are payable in pursuance of the provisions of Section 443.11. Hence, it is that the total amount which may be paid for such duties of these two members of the Commission under the Workmen's Compensation Division as per diem, and subsistence allowance as contemplated by §440.44 and payable from the fund described in §440.50 is limited annually per member to the sum of \$1000.

(3) In view of the reasoning and conclusions set forth in the preceding answers, this question is answered in the negative.

July 2, 1951—051-190.

FIC—TRUST FUNDS—FEES AND MONIES—BUDGET COMMISSION AUTHORITY

QUESTIONS: 1. Are monies and fees collected by Florida Industrial Commission under authority of Ch. 399, F.S., funds designated and indicated for regulatory purposes, or are such funds intended for revenue purposes only?

2. Are monies and fees collected by Florida Industrial Commission under authority of Ch. 449, F.S., funds designated and indicated for regulatory purposes, or are such funds intended for revenue purposes only?

3. If your answers to questions (1) and (2) are that such designated funds are for regulatory purposes, may the Budget Commission, under the authority of §2, (26) of Ch. 25068, Laws of 1949, set these funds aside in the Commission's Agency Fund established by §440.50, F.S., for use by the Commission in the performance of its duties under the respective Chs. 399 and 449?

To: Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:

Relevant parts of Ch. 25068, mentioned in the third question, have been incorporated in F. S. as §§282.001 and 282.002, and are so referred to herein.

The effect of §282.001 was to abolish continuing appropriations "without regard to the source from which the funds appropriated are derived, including funds derived from taxes, licenses and fees of all kinds, except as provided in Section 282.002," and that such funds deriving from such continuing appropriations so abolished were appropriated and transferred "to the general revenue fund of the State of Florida to be used as directed by law."

Among the funds excepted from the effects of §282.001 are those funds described in §282.002 (26), quoted as follows:

"All funds received by the state which are classified by the constitution of the State of Florida or by federal laws as trust funds. Provided same are itemized and maintained as separate accounts until disbursed as provided by law, and provided that the budget commission shall have power and authority to set up any other trust funds deemed necessary to carry out the provisions of §§282.001 and 282.002 or preserve the integrity of any funds received or collected for any specific use or purpose."

Chapter 399 has to do with the regulation of the operation of elevators. Florida Industrial Commission is charged with the administration of the provisions of said chapter (§399.10). Fees provided for in the chapter are derived from applicants for license as inspectors (§399.04) and from operators of elevators for certificates of operation (§399.06). Prior to its amendment by Ch. 26869, Laws of 1951, §399.09 provided as follows:

"*Fees.*—All fees provided for in this chapter shall be paid by cash, money order, or certified check to the Florida Industrial Commission, who shall transmit the same to the Commission."

Section 399.11 provides that fines which may be collected under §399.11 "shall be forwarded to the commission, who shall pay the same into the state treasury to the credit of the commission." Concerning the purpose of such fees and fines collected by the Commission under Ch. 399, reference is made to former opinion of this office 047-397, copy of which is attached.

Chapter 449 regulates private employment agencies, and Florida Industrial Commission is charged with its administration and enforcement. Fees provided for in the chapter are derived from agency licenses, managers' licenses and licenses for other agency employees (§449.02). Prior to its amendment by Ch. 26869, §449.11 provided as follows:

"*Collection, deposit and use of monies or fees.*—All monies or fees required to be paid under this chapter shall be collected by the Florida industrial commission and deposited in its administrative fund established by §440.50,

Florida Statutes. The commission shall keep a separate account for monies collected under this chapter and shall use said monies solely for administering this chapter."

On February 4, 1950, this office issued to Florida Industrial Commission opinion 050-66, copy of which is attached. It is to be observed that it was concluded in said opinion that funds deriving to the Commission under Ch. 399 and Ch. 449 were not trust funds within the meaning of §282.002 (26), but that said subsection "gives the budget commission power and authority to set up any other trust funds deemed necessary to carry out the provisions of the act or preserve the integrity of any funds received or collected for any specific use or purpose." Said subsection was interpreted as empowering the budget commission to set up as trust funds monies and fees collected under Ch. 449 and fees and fines collected under Ch. 399. For further details, reference is made to such former opinion.

Section 73 of Ch. 26869 amended §399.09 to read as follows:

"Fees.—All fees provided for in this chapter shall be paid by cash, money order, or certified check to the Florida industrial commission, who shall deposit same in the state treasury to the credit of the general revenue fund."

Section 82 of Ch. 26869 amended §449.11 to read as follows:

"Collection, deposit and use of money or fees.—All monies or fees required to be paid under this chapter shall be collected by the Florida Industrial Commission and deposited in the general revenue fund."

The Legislature provided no specific appropriations in the 1951 appropriation act for use of Florida Industrial Commission in its administration and enforcement of Ch. 399 and Ch. 449.

Revenues heretofore annually received under the provisions of Ch. 399 and Ch. 449 have approximated, respectively, \$4,000 and \$15,000. We are informed that enforcement of the provisions of these chapters in past years has cost the Commission annually not less than the amounts of such annual receipts. There seems little doubt that prior to the adoption of §282.001, fees and other moneys (except fines under Ch. 399) received by the Commission under these chapters constituted taxes for regulatory as distinguished from revenue purposes.

The adoption of §282.001 did not change such taxes from regulatory to revenue taxes. The amendments of §§399.09 and 449.11 by Ch. 26869, from a legal standpoint, effected no change in said sections when read in connection with §282.001; hence, the situation now with respect to such taxes and the nature of such taxes is identical with what it was at the time of the issuance of opinion 050-66. It is to be noted that §282.002 (26) remains in full force and effect.

A consideration of the provisions of Chs. 399 and 449 would seem to demonstrate without question that the Legislature properly determined that the regulatory provisions thereof were in the interest of public welfare; i.e., evils to be corrected were pointed out, and the methods of correcting such evils were provided. The burden of correcting such evils, by the means and methods set forth in the

respective chapters, was placed on Florida Industrial Commission. The fact that the Legislature did not appropriate money for the enforcement of the provisions of such chapters can hardly be urged as indicating legislative intent and determination that the evils had ceased to exist as long as the Legislature sees fit to denounce such evils in existing laws. Furthermore, it is assumed the members of the Legislature were cognizant of the provisions of §282.002 (26) when they made no special appropriations in the 1951 appropriation act for enforcement of these laws.

In view of the foregoing, in my opinion the above questions are properly answered as follows:

1. Monies and fees collected by Florida Industrial Commission under authority of Ch. 399 were intended for regulatory and not revenue purposes; and the adoption of §282.001 or Ch. 26869 has not changed such purpose.

2. Monies and fees collected by Florida Industrial Commission under authority of Ch. 449 were intended for regulatory and not revenue purposes; and the adoption of §282.001 or Ch. 26869 has not changed such purpose.

3. The Budget Commission, under the authority of §282.002 (26), may set these funds aside in the Commission's agency fund established by \$440.50 for use by the Commission in performance of its duties under the respective Chapters 399 and 449.

It is to be noted that this opinion is in full accord with former opinion 050-66.

July 19, 1951—051-226.

STATE AGENCY—ASSESSMENT—ADMINISTRATION— ENFORCEMENT CH. 26841, ACTS 1951

QUESTIONS: 1. May the "state agency" (the chairman of the Florida Industrial Commission or his authorized representative), under Ch. 26841, Laws of 1951, fix an assessment to be paid by each "political subdivision" (instrumentalities and political subdivisions of the state) electing to come under the said statute, as a part of the cost of administering the said statute?

2. May the said "state agency" when making the assessment mentioned use, as the formula or basis for making the said assessment, a percentage of the taxes which will be due and payable upon the payrolls of employees of such "political subdivisions" coming within said Ch. 26841?

3. Is there authority for the deposit of funds derived from such assessments in an appropriate account in the State Treasury to be disbursed in accordance with the directions of the "state agency" to meet the expenses of enforcing said Ch. 26841?

To: Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:

The Congress of the United States has provided for the extension of certain features of the federal social security act to officers

and employees of the states and their political subdivisions and instrumentalities and not within the purview of state and local public retirement systems (64 Stat. 514; 42 USC 418). This federal act was recognized and made effective in Florida by Ch. 26841, Laws of 1951.

This provision in effect requires political subdivisions and state instrumentalities, "as to which a plan has been approved," to contribute to the expenses of the enforcement of the said chapter. Under the definition contained in §3 (6) of said statute, we feel that it was the intention of the Legislature to extend the operation of the act to all political subdivisions and instrumentalities of the State having employees not within the purview of some public retirement.

Under the provisions of §5 of the above act (quoted above), whenever a "political subdivision" is brought under the federal social security statutes, through the said state act, it becomes liable to the "state agency" for its "proportionate part of the cost of administering" the said statute. This language is deemed sufficient to show an intention on the part of the Legislature to make an appropriation of "political subdivision" funds to pay for the enforcement of Ch. 26841, said act being for the benefit of such political subdivisions.

These contributions by the "political subdivisions" to the cost of enforcing said Ch. 26841 are required to be apportioned between the said subdivisions in proportionate parts to "be computed and paid in accordance with such regulations thereto as may be adopted by the state agency." Under this provision of the statute the state agency would seem to be required to work out a formula for the equitable apportionment of the costs and expenses of enforcement among the several political subdivisions and state instrumentalities coming under the statute and within its operation. Although the proportionate parts might be said to be divided equally between the several subdivisions coming under the statute, we do not think that such a proportionment was intended by the Legislature. We feel that the Legislature intended that the proportionment be made in such manner that each political subdivision would pay its just or equitable share. The costs of enforcement as to each political subdivision may vary due to number of officers and employees, the amount of taxes to be collected, and other things. Whether or not an apportionment based upon the amount of taxes paid would be an equitable apportionment would probably be a question of fact and not a pure question of law. Whether or not such an apportionment would be equitable should be ascertained from all the facts and circumstances.

It appears that the amount collected by the state agency for administrative purposes, as distinguished from the contributions to be placed in the contribution fund, is to be expended for the enforcement and administration of Ch. 26841 and may be used for no other purpose. This administration, although by an agency created by the Legislature, appears to be for the special benefit of certain political subdivisions and state instrumentalities. For that reason we feel that the funds collected for administrative purposes are in the nature of trust funds ear-marked for a particular purpose. We, therefore, feel that these funds are within the classification of "trust funds" within the purview of §215.30, F.S., known as the five funds law. Such funds are payable into the State Treasury ear-

marked for use in connection with the enforcement of said Ch. 26841. These funds, being derived from sources other than taxation, are not funds that may be used for the general operation of the state. From this sense they appear to be trust funds. We, therefore, feel that they should be treated as "trust funds" and within the purview of §215.30, F.S.

We, therefore, feel that the above questions should be answered as follows:

1. The first question in the affirmative.
2. The second question, presenting more a question of fact than a question of law, is not answered; however, the formula for calculating the contributions is set out above.
3. The third question in the affirmative.

September 19, 1951—051-322.

WORKMEN'S COMPENSATION—EMPLOYERS—POOLING LIABILITIES

QUESTION: An agreement has been entered into by and between a group of employers whereby they have become self-insurers under the Workmen's Compensation Law, apparently in pursuance of §440.57, F.S. The agreement attached to the request for opinion is described below. The agreement has been approved by Florida Industrial Commission. Does this agreement and the arrangement afforded thereby for the group of employers who are parties thereto violate any of the insurance laws of Florida?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The Insurance Commissioner states clearly that in making this inquiry he does not question the action of Florida Industrial Commission in approving this agreement.

The agreement recites in effect that "the undersigned persons, firms and corporations hereinafter referred to as 'members' have applied to Florida Industrial Commission for authority to become group self-insurers, pursuant to the terms of the Workmen's Compensation Law and specifically as provided by §440.57, F.S."; that the "members" have organized and formed a fund to represent such members, such fund to be known as "The Florida Building Materials Industries Self-Insurers Fund"; that the members of the Fund have designated a Board of Trustees to direct affairs of the Fund and to pass upon the admissibility of future members of the Fund, that the Trustees have designated three named persons as partners doing business under a partnership name, as Administrators of the Fund.

The agreement further recites that the Industrial Commission, upon petition of such group, has made its order approving such application, but upon these conditions; that the group shall, before being issued a certificate, post a \$25,000 bond, acceptable to the Commission, to secure performance of any awards which might be made against the fund or members thereof; that the members of the Fund shall execute an agreement "whereby in addition to the collateral

just mentioned", the Fund and its members will jointly and severally covenant to assume and discharge by payment lawful awards against any member of the group entered by the Commission and subsequently sustained by the Courts, where an appeal is taken by either party; that the members execute an agreement whereby each will jointly and severally agree to pay premiums, based upon appropriate classifications, into a designated cash reserve fund out of which lawful claims and awards are to be paid, and that there will be no disbursements out of the Fund, by way of dividends or distribution of accumulated reserves, to the respective members, except at the direction of the Trustees, and until all obligations under Florida Workmen's Compensation and Employers' Liability Act are discharged.

The agreement further recites acceptance and compliance with such conditions of the Commission. The remainder of the instrument provides in detail for administration of the Fund. With exception of the matters specifically mentioned in this paragraph, it is sufficient here to state that the arrangement thus accomplished and the administration of the Fund resembles reciprocal or inter-insurance (see Ch. 628, F.S.; Appleman, Insurance Law and Practice, Vol. 18, page 224). Administrators of the Fund are designated attorneys-in-fact for each member whereby such Administrators are vested with comprehensive and detailed powers, among which is the power to execute "re-insurance contracts." The Trustees are authorized and directed to "take all reasonable precaution to protect the members from a loss and may in their sole discretion enter into any suitable contract to protect said members against excess loss." The trustees are granted broad power to admit as members of the Fund "any acceptable and financially sound business in the State of Florida engaged in the building materials industries," and to suspend or expel a member.

The copy of agreement furnished is executed by "The Florida Building Materials Industries Self-Insurers Fund," by the Chairman of the Board of Trustees, and attested by the Secretary. It is not apparent from this instrument who are members of this Fund, but it is assumed that appropriately executed documents filed with the Industrial Commission disclose this fact. Attached to the agreement is an acceptance by the named Administrators of their duties under the agreement.

Section 440.57, F.S., provides that, "The commission may, under such rules and regulations as it may prescribe, permit two or more employers to enter into agreements to pool their liabilities under this chapter for the purpose of qualifying as self-insurers, and each employer member of such approved group shall be classified as a self-insurer as defined in this chapter."

It is quite evident that an individual self-insurer, as contemplated by §440.38 (b), F.S., is not engaged in the insurance business. However, §440.57, subject to rules and regulations as the Commission may prescribe, permits two or more employers to enter into agreements "to pool their liabilities under this chapter for the purpose of qualifying as self-insurers . . ." The verb "pool" in its transitive and intransitive forms means, "To put into a common fund; as to pool interests"; and, "To contribute with others." (Webster's Twentieth Century Dictionary). The arrangement under this

agreement whereby there is accomplished a "pooling of liabilities," results in the members to the agreement being self-insurers and also insurers for each other.

It is assumed that the agreement here considered is in pursuance of rules and regulations prescribed by the Commission, in pursuance of §440.57, and that such agreement has been approved by the Commission. This opinion is conditioned upon such assumption.

This agreement constitutes a "pooling of liabilities," which may arise under the Workmen's Compensation Law, by two or more employers. It results in an operation which constitutes the business of insurance. However, it seems to be authorized by §440.57. Hence, it is not apparent that the arrangement violates any of the insurance laws of Florida.

October 18, 1951—051-367.

FLORIDA INDUSTRIAL DEVELOPMENT COUNCIL—SURVEY —EXPENSES

QUESTION: May the Florida Industrial Commission reimburse the State Chamber of Commerce out of either the Employment Security Administration Fund established by §443.14, F.S., or the Workmen's Compensation Administrative Fund established by §440.50, F.S., for cost of preparation and publication of an industrial survey made for the Florida Industrial Development Council?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

In order that a state may obtain the fullest benefits from Federal grants, it is necessary that the Florida Industrial Commission comply with the regulations enacted by the Federal Congress relating to the handling and expenditure of monies received by the Employment Security Administration Fund.

Federal statute requires that funds paid to the State for Employment Security Administration Fund shall be used only for that purpose, and in the amount found necessary by the cooperating Federal agency and may not be used for general state purposes.

In State vs. Florida State Improvement Commission, 158 Fla. 743, 30 So. 2d. 97, the Supreme Court held that the funds established by §440.50, F.S., are trust funds; that they are never available for the general purposes of the State but are solely to be used for the fulfilment of the requirements of the Workmen's Compensation Act.

I feel that the funds in question are funds held in trust by the State. They are derived from sources other than by taxation and cannot be used for the general operation of the state.

The payment of debts incurred by the Florida Industrial Development Council does not fall within the bounds of the enumerated purposes for which the Employment Security Administration Fund, §443.14, F.S., and the Workmen's Compensation Administrative Fund, §440.50, F.S., were established.

I, therefore, answer your question in the negative.

UNEMPLOYMENT COMPENSATION LAW

March 9, 1951—051-50.

LEGISLATIVE ACT—EMPLOYEES—TAXES ON WAGES

QUESTION: (1) Would an act of the legislature levying a tax upon the wages of covered workers within this state, the proceeds of such tax to be used solely for the purpose of paying illness and disability benefits to such workers, with administration financed by general state funds, be deemed a tax upon income of residents or citizens of this state within the meaning of the prohibition contained in Art. 9, §11, of the Florida Constitution, above set forth?

(2) If your answer to Question 1 above was in the negative, would it remain the same should the subject statute provide that part of said tax proceeds are to be used solely to defray the expenses of administering said statute, but for no other state purpose?

(3) Would an act of the Legislature levying a tax upon the wages of covered workers within this state, the proceeds of such tax to be used solely for the purpose of paying unemployment compensation to such workers, with administration financed by federal funds, be deemed a tax upon income of residents or citizens of this state within the meaning of the prohibition contained in Art. 9, §11, of the Florida Constitution, above set forth?

To: *Honorable Raymond E. Barnes, Chairman, Florida Industrial Commission:*

Article 9, §11, Florida Constitution, provides in part as follows:

"Section 11. No taxes upon inheritance or upon the income of residents or citizens of this State shall be levied by the State of Florida, or under its authority, . . ."

It appears that the legislation here proposed is to afford benefits to employees for loss of wages occasioned by accident and sickness not covered by either the workmens' compensation law or the present unemployment compensation law. In other words, the proposed legislation would require compulsory health and accident insurance for the classes of employees to be therein defined, payable from a fund to be derived from a tax on the wages of the employees covered thereby. It is recognized that the proposed legislation might provoke controversial issues. This opinion is concerned only with the legal principles involved.

Florida's workmens' compensation law (Ch. 440, F.S., 1949) provides benefits as therein set forth for injuries or illnesses incurred in connection with employment. The burden of securing the payment of claims under said act falls upon the employer and not the employees.

Florida's unemployment compensation law (Ch. 443, F.S.) enacted in pursuance of the Federal Social Security Act, provides for unemployment compensation benefits to the extent therein set forth to the classes of employees covered thereby. The fund from which such benefits are payable is derived from contributions required of employers in pursuance of the requirements of the law.

On several occasions our Supreme Court has ruled upon whether a particular tax violated the above constitutional provision prohibiting the imposition of a state income tax.

In *State v. Lee*, 163 So. 859, it was held that a statutory scheme for diminution of an appropriation made by the general appropriation act to pay state college teachers for services already rendered under valid contracts because secondary appropriations to county school fund were not realized, and the amounts appropriated for such teachers were subject to deduction to make up the deficit in the county school fund, constituted an income tax to the extent of such deduction prohibited by the above constitutional provision.

In *State v. Keller*, 191 So. 542, it was held that an ordinance of the City of Tampa imposing license taxes of \$25 on attorneys, with increased levies based on increased receipts, was in contravention of the above constitutional provision against a state income tax and was void as applied to any attorney whose gross receipts required of him the additional amount of tax.

In *Mahan v. Lummus*, 35 So. 2d 725, it was held that where a present vested beneficial interest of a Florida resident in a trust, if it amounts to nothing more than mere naked right to receive income from an estate, such interest is not subject to intangible personal property tax on such bare interest since same would be in violation of said prohibition against state income taxes. See also *Owen vs. Fosdick*, 13 So. 2d 700, of similar import.

Among other constitutional impediments urged in *Gaulden v. Kirk*, 47 So. 2d. 567, involving an attack on validity of certain aspects of our present sales tax law, it was urged that such tax violated the above constitutional prohibition against the levy of income taxes. Specifically the court did not rule on the point, but generally in concluding its discussion of the various issues raised in the case stated in effect that the Florida Revenue Act of 1949 did not violate any of appellant's constitutional rights.

In *City of Lakeland v. Amos*, 143 So. 744, the court held that a state law imposing a tax upon the gross receipts of corporations receiving payment for electricity and light, etc., was not invalid as a tax upon the income of such corporations, but imposed a mere license or excise tax.

Thus it is to be observed that if the tax sought to be levied and collected is an excise tax for the privilege of engaging in a particular business or profession, it does not fall within the above constitutional prohibition.

In pursuance of the requirements of the Federal Social Security Act the State of Alabama in 1939 adopted an unemployment compensation law meeting the requirements of the federal legislation with respect to such a state act. Unlike the Florida act since its adoption, at least originally the unemployment compensation fund of the State of Alabama was derived by a tax not only on employers but also on employees coming under the effect of the act, the rate of contribution by employees being fixed at a definite per cent of their wages. In *Beeland Wholesale Company v. Kaufman*, (Ala.) 174 So. 516, involving the validity of such act under the Alabama

Constitution, in effect the court held, among other things: (1) that such an act was a valid exercise of the police power of the State of Alabama; (2) that the contributions required under the act to be exacted of both employers and employees falling in those classes covered by the act did not constitute a tax upon property within the constitutional sense in Alabama; (3) that such contributions did not constitute an income tax under the constitutional provision for a state income tax in Alabama; and (4) that such contributions constituted excise taxes implementing and in connection with the unemployment compensation law so held to be a valid exercise of the police power of the State of Alabama.

Florida's unemployment compensation law is a valid exercise of the state's police power and subserves public good, the well-being of wage earners and the welfare of the state in its compulsory unemployment insurance plan (Florida Industrial Commission, et al, v. Growers Equipment Company, 12 So. 2d 889). We have noted above the distinction our court has made between a tax which is an excise tax for the privilege of engaging in a particular business occupation or profession as distinguished from an income tax within the meaning of the above constitutional prohibition. An excise tax on the right to be employed was known in England and the colonies before the adoption of the federal constitution and must be taken to be embraced within the wide range of choice of subjects of taxation which was an attribute of the sovereign power of the states at the time of the adoption of the federal constitution, and which right was reserved to them by that instrument. Thus, such a tax is of a type traditional in the history of Anglo-American legislation (Carmichael v. Southern Coal and Coke Company, 301 U. S. 495, 81 L. Ed. 1245).

It would seem probable that if the present unemployment compensation law of this state is a valid police regulation, legislation contemplated by the first question properly drawn and providing for the mentioned benefits over and beyond benefits presently payable under the unemployment compensation law and workmens' compensation law, would be a valid exercise of the police power.

(1) It is obvious from the above discussion that the question of whether the tax contemplated by the legislation proposed would offend the constitutional provision prohibiting a state income tax is highly controversial. No opinion of this office could settle that question with finality. The question could be settled only if the legislation here proposed were duly enacted and its validity tested in appropriate court proceedings. On the basis of the above, it appears that respectable argument to sustain such a law can be urged if the same is enacted.

(2) If the act should provide that a part of the tax to be raised thereby should be used solely to defray the expenses of administering said statute, such use of the tax would not change the effect of the answer to the preceding question; in other words, whether the proposed tax is to be used solely for paying the benefits sought to be covered, or partially for administering the expenses of such an act and the remainder thereof for payment of such benefits, would seem immaterial with respect to the question of whether the tax violated the mentioned constitutional provision.

(3) Only the courts in appropriate proceedings involving the validity of an enacted law providing the tax contemplated by this question could with finality determine whether such tax would offend Art. 9, §11, Florida Constitution. The comments in response to the first question are equally applicable to this question.

May 3, 1951—051-102.

UNEMPLOYMENT COMPENSATION TAXES—EMPLOYER-EMPLOYEE RELATIONSHIP

QUESTION: Is the relationship between Lawrence M. Lyon, d/b/a Lyon Supply Company, (hereinafter referred to as "company") and his salesmen, as evidenced by agreements between him and such salesmen conditioned as described below herein, an employment relationship within the contemplation of Chapter 443, F. S.?

To: Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission;

The request for opinion has attached thereto the following: copies of contract between the company and two named salesmen (Robert R. Peaden and Charles B. Palmer); questionnaire submitted to the company by Bureau of Internal Revenue and copy of answers to such questionnaire; schedule of forms, inventories and reports furnished to and used by the salesmen for the company, and copy of opinion dated August 9, 1950, delivered by the Deputy Commissioner of Internal Revenue to the company.

The purpose of the questionnaire submitted to the company by the Bureau of Internal Revenue and answers thereto was in connection with the determination by the Bureau relative to the federal employment tax status of certain persons with respect to sales services performed by them for the company. It was the determination of the Commissioner of Internal Revenue that the relationship between the company and these salesmen was not the relationship of employer and employee for federal employment tax purposes. While such determination is persuasive of the question here involved, it is not conclusive of it.

From the enclosures which accompanied the request for opinion, it appears that the company is engaged in the house-to-house installment selling of housewares, selling from stocks of merchandise carried by the salesmen and consigned to them by the company. The company engages not less than twenty persons as their salesmen, compensated on a commission basis, to sell such stocks of merchandise so consigned to them and to make collections. Among the salesmen of the company is one Robert R. Peaden, whose contract is referred to above. This contract was the specific one dealt with by the Commissioner of Internal Revenue in his determination of August 9, 1950, mentioned above, and it is the contract here considered. It appears that Peaden applied to the company for the position of salesman and was engaged as such under the terms of the written agreement dated November 4, 1946. Among other things, the contract entered into provides that Peaden will act as salesman or collector for the company; furnished such security or guarantee as may be satisfactory to the company for his faithful performance

of the agreement; that he will devote his time and attention to the collection of such company accounts as may be referred to him, and shall sell and lease merchandise belonging to the company consigned to him for such purpose; that he will assume and pay all his expenses incurred in or arising out of his association with the company, including costs of the delivery and return of merchandise and the repair or replacement of any merchandise that may be damaged or lost; that he will report in writing, daily or weekly, as the company may from time to time direct, upon forms furnished him, giving full and complete account of all business transacted for the company. That he will return at the company's request, without expense to the company, either before or at the termination of the agreement, all merchandise and property belonging to the company not disposed of by him; and that he will sell and lease merchandise at prices established by the company.

Further information concerning the relationship existing between the company and Peaden gathered from the enclosures, particularly from the questionnaire mentioned and answers thereto, is to the effect that this salesman does not report in person but makes weekly written reports of sales made; that he is not furnished with office facilities and not required to perform any services on the company's premises; that he is not required to follow a routine, canvass a territory within a specified time, produce a minimum volume of sales or call on particular customers or prospects; and that he furnishes his own automobile and pays all expenses incurred in the operation thereof without accounting to the company or without reimbursement by the Company.

In *Gentile Bros. Company v. Florida Industrial Commission*, 10 So. 2d. 558, the court recognized that certain words such as "employment", "employee", "wages", "remuneration", "employing unit", "agents", and others used in Ch. 443 are not used in a restricted sense but are subject to liberal construction to cover or extend the beneficent purpose of the unemployment compensation law. Nevertheless, the court observed, when the legislature enacted this act it was fully conscious of the master-servant relationship as it existed at common law; and that such is the concept of employment contemplated by the unemployment compensation law. The court held further in that case that an independent contractor is one who pursues an individual employment or occupation and represents his employer as to the results of his work but not as to the means by which the results are accomplished. See also *Gulf Refining Company v. Wilkinson*, 114 So. 505; *Florida Industrial Commission v. State*, 21 So. 2d. 599; *Florida Industrial Commission v. State*, 32 So. 2d. 319; also §§ 2, 3, 4, 5 and 6 under the title "Master and Servant", 35 Am. Jur., pages 445-449.

If the circumstances and the relationship existing between the company and its other salesmen is the same as that which apparently has existed between it and its salesman Peaden, on the basis of the above authorities, measured against the circumstances of that relationship, it is my opinion that the company's salesmen are independent contractors.

The request for opinion mentions the fact that the company has requested a refund of contributions, involving several thousand dollars, made with respect to these salesmen on the ground

that they are independent contractors. If reasonable doubt existed concerning the question of this relationship, the proper position to be assumed would be to insist on collection of contributions unless and until a court of competent jurisdiction had ruled contrary to the contention of the Commission. It is not felt that such doubt here exists. Hence, conditioned as above set forth, it is my opinion that the relationship existing between the company and its salesmen is not the master-servant relationship contemplated by Ch. 443.

May 5, 1952—052-147.

EMPLOYERS—EMPLOYMENT RECORDS—EXPERIENCE
RATING—NON-RESIDENT STATE—TRANSFERS

QUESTION: Under your interpretation of the provisions of Ch. 443, F. S., can an employer beginning operations in this state and who has been subject to an unemployment compensation law of another state and has acquired an experience rating in such other state, transfer his employment records and experience rating to this state for the purpose of receiving a lower contribution rate from the standard rate of 2.7%?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

While I have been unable to find any provisions of Ch. 443 which would expressly prohibit such a transfer of experience rating as you present for consideration, it would appear to be implicit in the section on contributions (§443.08) that the benefit ratio entitling an employer to a lower than standard contribution rate be based on experience gained by the employer while operating in this state. And although it is true that federal law (26 USCA, §1602 (a) (1) requires all states to allow reduced rates of contribution only on a basis of experience bearing a direct relation to unemployment risk during not less than three consecutive years immediately preceding the computation date, other factors involved in the computation of an employer experience rating may vary from state to state to such an extent that the resulting experience rating of an employer in one state may bear no direct relationship to the contribution tax rate assigned such employer in this state if he were allowed to transfer such rating when beginning operations in Florida.

For example, the "base period" of an employee as defined by §443.03 is an important factor in determining whether an employer's employment record is "chargeable" with benefit payments to an employee in computing the benefit ratio provided by §443.08 (3) (b). A shorter, longer or otherwise different "base period" set up by the statutes of another state, could result in a substantially different "benefit ratio" or experience rating of an employer in that state seeking to use such rating in this state to vary his contributions rate from the 2.7% standard. It should also be obvious that a higher or lower rate of benefits payable to covered employees would change the rating or ratio. In addition, there are some jurisdictions, Pennsylvania being one, where the ratio, upon which the contributions rate is dependent, is gauged to relationship between an employer's experience and the experience of

the state as a whole. Finally, there would be the apparently impossible situation where benefit payments are not charged to the employer's employment record at all—Mississippi being the only state in this category.

There is also the important consideration of whether, even where two states' methods of computing the experience rating to which the tax rates are applied are identical, the experience of an employer in one state is at all indicative of his future experience in another, especially where the labor market and other economic factors of the two vary greatly.

I have been unable to find any case in any jurisdiction which involved such an attempt to transfer an experience rating as you suggest. This indicates to me, in at least a negative way, that it has been assumed that such could not be done. If the primary purpose of unemployment compensation laws is the encouragement of employment stabilization through the incentive of lower tax rates, then every effort should be made to devise a workable method of transferring employer experience ratings from one state to another. If, however, the primary purpose is to secure the widest benefits for unemployed, then there is no valid reason to attempt to construe the laws so that such a transfer can be made. My study of Ch. 443 leads me to conclude that at least there exists no legal right of an employer to have his experience rating acquired in another state transferred to this state for an assignment of a contribution rate when beginning operations in this state. And prior to the amendment to §443.08 (3) by Ch. 21981, Laws of 1943, allowing transfer of experience ratings to successor employing units, our Supreme Court did not appear to be the least inclined to construe our unemployment compensation law in favor of an employer trying to gain the advantages of a favorable past employment experience record. See *Florida Industrial Commission v. Schwob Co.*, 153 Fla. 356, 14 So. 2d 666.

In view of the foregoing, therefore, I am of the opinion that the provisions of Ch. 443, F. S., do not entitle any employer beginning operations in Florida to transfer their employment records or experience rating gained while operating under an employment compensation law of another state so as to enable any such employer to pay a contribution tax rate lower than the standard 2.7%.

August 10, 1951—051-270.

F. I. C. CHAIRMAN—"STATE AGENCY"—PROPOSED AGREEMENT—OASI FORMS

QUESTIONS: Congress of the United States has provided for extension of certain features of the federal social security act to described officers and employees of the states, their political subdivisions and instrumentalities (42 U.S.C.A. 418). This federal legislation was made effective in Florida by Ch. 26841, Laws of 1951. The Chairman of the Florida Industrial Commission was designated as the "state agency" for administration of the provisions of such state act. In an effort to commence performance of his duties under the act, the "state agency" has caused the following listed documents to be prepared ("OASI" as used being

the old age and survivors insurance contemplated by the state and federal laws):

(1) Agreement between state agency and the federal agency.

(2) Proposed Form Fla. OASI-1, "Considerations for local governments."

(3) Proposed agreement between the state agency and local political subdivision (Form Fla. OASI-2).

(4) Draft of suggested resolution for adoption by local Boards of County Commissioners (Form Fla. OASI-3).

(5) Draft of suggested resolution for adoption by local governing bodies, such as drainage districts, hospital districts, etc. (Form Fla. OASI-4).

(6) Draft of suggested ordinance for adoption by municipalities (Form Fla. OASI-5).

(7) Draft of proposed Code of OASI regulations.

In view of the provisions of Title 42, U.S.C.A., §418, and Ch. 26841, Laws of 1951, are the forms of such described documents in conformity with the requirements of said laws?

To: Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:

Other than as briefly mentioned herein, the contents of the enumerated documents are not herein described. They are attached to the request for and filed with this opinion.

The legal sufficiency of these several proposed documents must be determined by the requirements of applicable Federal legislation (Title 42, U.S.C.A., §418) and state legislation (Ch. 26841).

As indicated below, these described forms are approved, subject to certain suggestions. That answer is not to be given, however, without discussing the definition of "political subdivision" in subsection 2 (6) of Ch. 26841, as follows:

"The term 'political subdivision' includes *as* instrumentality of a state, or one or more of its political subdivisions, but only if such instrumentality is a *juristic entity* which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision."

Since the proposed instruments described above in paragraphs 3, 4, 5, and 6 refer to counties, municipalities and local governing units, such as drainage districts and hospital districts, the above definition is of significance and requires some discussion.

The underscored word "as" in the quoted definition is obviously intended for "an" and is so construed (while not directly in point, but apparently controlling, see *State v. Holland (Fla.) 2 So. 2d. 735*). On the other hand, the word "as" may be treated as

surplusage without doing violence to the remaining words of the definition (*State v. Dudley*, (La.) 106 So. 364). The underscored words "juristic entity" are not to be permitted to confuse and confound; stripped of their formidable sound, they simply mean "legal entity". The above quoted definition found in subsection 2 (6) is not to be construed as limiting "political subdivision" to an "instrumentality" of the state or political subdivision thereof, as set forth in this subsection; rather this definition enlarges the meaning of "political subdivision" as commonly understood and as referred to in subsection 2 (2) of Ch. 26841. There is no doubt that a county is a political subdivision of Florida and it is to be noted that drainage districts and hospital districts are specifically referred to in said subsection 2 (2). The status of a municipality in view of these definitions requires consideration.

Generally it may be said that in this state a municipal corporation is not a political subdivision of the state (*Kaufman v. City of Tallahassee* (Fla.) 94 So. 697, 30 A.L.R. 471; *In re City of Ft. Lauderdale* (D. C. Fla.) 23 F. Supp. 229). In the original Social Security Act relating to old age and survivors insurance, excepted from the term "employment", among other things, was services performed in the employ of a state or any political subdivision thereof "or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions" (Title 42, U.S.C.A., §409 (7)). While under the quoted definition appearing in subsection 2 (6) of Ch. 26841, a municipality might be construed as an instrumentality of the state as therein expressed, it could hardly be construed as an instrumentality wholly owned by the state or a political subdivision as expressed in Title 42, U.S.C.A., §409 (7). Since employees of municipal corporations have from the beginning been excepted from the effect of the federal legislation mentioned, it is assumed that this has been done on the basis of the federal authorities' construction of "political subdivision" as including municipal corporations. Such construction is here adhered to in order to effect the evident purpose and intent of Title 42, U.S.C.A., §418 and Ch. 26841, Laws of 1951.

The copies of documents described in the statement and question above and attached to the request for this opinion are approved as to form, subject to the following comments:

Section 5 of the proposed code of regulations referred to above in paragraph 7 of the statement and question provides that a political subdivision applying for and participating in this program shall pay a fee of \$25 to defray administrative costs of negotiation and approval of the plan submitted; and thereafter the participating political subdivision, to meet current costs of administering Ch. 26841 by the state agency, shall be liable to and pay the state agency an amount equal to 5% of the contributions shown to be due and payable by the political subdivision for each calendar quarter.

Subsequent to receipt of this request for opinion the above counsel for Florida Industrial Commission and this office conferred concerning this item of 5%, and it was agreed that the regulation should be changed to provide that after experience had

demonstrated the costs necessary to administer Ch. 26841, this item for current administrative costs was subject to change from time to time to meet the actual requirements of such costs.

When an agreement is entered into between the state agency and a political subdivision, as contemplated by Ch. 26841, in addition to the contributions required to be paid by the political subdivision there should be set forth in such agreement and in such ordinances, resolutions, etc., required to be adopted or executed in connection with the agreement by the political subdivision, a provision setting forth the amount required to be paid by the political subdivision to the state agency as its part of the current administrative costs of the state agency in administering Ch. 26841. This may be done by a provision setting forth the amount required of the political subdivision for this purpose or by reference to the code of regulations providing the amount required to be so paid.

December 23, 1952—052-334.

STATE TREASURER—OFFICIAL BOND—FUNDS—
VETERANS' READJUSTMENT ACT OF 1952

QUESTION: Does the official bond of the State Treasurer of Florida cover the duties and responsibilities of such officer in connection with his handling of monies received by Florida from the Federal Government for the payment of compensation under Title IV of the Veterans' Readjustment Assistance Act of 1952?

To: Honorable Burnis T. Coleman, General Counsel, Unemployment Compensation Division, Florida Industrial Commission:

The significance of the above question is apparent after a recital of the matters set forth in the succeeding paragraph.

Under the provisions of Title IV of the Veterans' Readjustment Assistance Act of 1952, Florida Industrial Commission has entered into an agreement with the Secretary of Labor of the United States to act as his agent in making payments of unemployment compensation to veterans as authorized by said Act. Pursuant to such agreement, advances of funds are made available to Florida Industrial Commission by the Government, and these funds are deposited with the State in the benefit account of the unemployment compensation fund established by §443.10, F.S. The agreement mentioned was entered into by Florida Industrial Commission and the Secretary of Labor pursuant to the Federal Act mentioned and §443.12 (11), particularly paragraph (b) thereof. It is further to be noted that the execution of such agreement also would appear to be authorized by §443.18, F.S., particularly subsections (3) and (4) thereof. Florida Industrial Commission is now required to certify to the Secretary of Labor whether the State Treasurer of Florida is liable on his official bond with respect to the federal monies made available to Florida under the above federal and state laws and the agreement mentioned.

The bond of the State Treasurer required by §18.01, F.S., covers not only funds deposited with that official as State Treasurer but also covers his faithful execution of the office of Treasurer in relation to his duties as Treasurer of each board or fund of which

he is or may be by law ex officio the Treasurer. The duties of State Treasurer as defined by the Constitution do not exclude other duties that may be imposed upon him by law; or to express it differently, properly funds may be deposited with him as State Treasurer or ex officio Treasurer of any board or fund if such is permitted by the Constitution or statutes of this State. (*Singleton v. Knott*, 133 So. 71) In view of this statement of law, and the provisions of §18.01, it becomes apparent that the real question here is whether under our Constitution and laws funds made available under Title IV of the Veterans' Readjustment Assistance Act of 1952, to the extent and under the circumstances mentioned, properly may be deposited with the State Treasurer or with that officer as ex officio Treasurer of such funds.

Section 443.10, F.S. in detail provides for the unemployment compensation fund and specifically describes the sources of monies constituting such fund. Said section further provides for a benefit account deriving from said fund. The State Treasurer, by said law, is made the ex officio Treasurer and custodian of such funds. The wording of §443.10, specific as it is, reasonably is not susceptible to a construction making the State Treasurer ex officio Treasurer of the funds made available under the federal law mentioned. A consideration of the other provisions of Ch. 443, F.S., constituting the unemployment compensation law of Florida, does not appear to permit a construction whereby the State Treasurer is ex officio Treasurer of these federal funds.

Attention is now directed to §§215.30 and 215.32, F.S. The first of these sections provides that state funds shall be divided into five groups, the fifth group mentioned being the "trust fund". Section 215.32 (5) provides that "The trust fund shall consist of funds coming to the State from every source whatsoever of a trust nature, shall be properly accounted for and held in said trust fund until disbursed as provided by the biennial appropriations bill or as provided in the trust provisions under which such monies are received". (Emphasis supplied.) Section 282.06, F.S., provides that federal money appropriated by the Congress of the United States to be used for state purposes, whether by itself or in conjunction with monies appropriated by the Legislature of the State, is thereby reappropriated as far as it may be necessary to the purpose for which same was made available and in so far as the same is permitted by the federal statutes.

Reasonably it appears that funds available to Florida under the Federal law mentioned are "funds coming to the state", as such words are used in §215.32 (5), and constitute "Federal money appropriated by the Congress of the United States to be used for state purposes", as such words are used in §282.06.

In view of the foregoing, in my opinion the above question properly is answered as follows:

Funds made available to Florida under Title IV of the Veterans' Readjustment Assistance Act of 1952 and deposited with the State Treasurer are held by that official in his capacity as State Treasurer. His official bond required by §18.01, F.S. covers his duties and responsibilities in connection with the handling of such

funds made available to Florida under the circumstances mentioned.

It is evident from the provisions of §§215.30, 215.32 and 282.06, referred to above, that these funds now or hereafter deposited with the State Treasurer are trust funds. There appears to be no objection to these funds being placed in the benefit account of the unemployment compensation fund. However, the State Treasurer should maintain such an account with respect to these funds so made available by the Government that the records of his office may evidence all deposits and disbursements of such funds. This is an administrative detail which may be worked out between Florida Industrial Commission and the State Treasurer.

APPRENTICES

October 16, 1951—051-364.

FLORIDA APPRENTICESHIP COUNCIL—SECRETARY —APPOINTMENT

QUESTIONS: 1. May the Chairman of the Florida Apprenticeship Council appoint a secretary of apprenticeship and hire other employees for the council?

2. May the chairman of the council obtain written or telegraphic statements from some or all members of the council and, in pursuance of authority sought to be granted in such statements, appoint such secretary or employ help without calling an official meeting of the council?

3. In the event of lack of a quorum, could members of the council present at a meeting make an interim appointment of such secretary, subject to approval of the entire council at another meeting?

4. May a member of the council, absent from an official meeting, vote at such meeting through another member holding the absent member's duly executed proxy?

5. Is the chairman of the council lawfully authorized to make an interim appointment of such secretary?

6. Does the secretary of the council come under the merit system?

7. Is there anything in the law which places such secretary, "Under administrative direction of the Chairman of the Florida Industrial Commission?"

To: Honorable Raymond B. Cortadellas, Jacksonville, Florida:

Florida Apprenticeship Council is a department of Florida Industrial Commission composed of twelve members. The Chairman of Florida Industrial Commission is a member and designated chairman of the council, without vote except in case of a tie; and the "supervisor of trade and industrial education", is a member as a consultant without vote. The remainder of the members are appointed by the Governor, five representatives each from employer and employee organizations respectively, representing the trades

described. The council is authorized and required to establish standards for apprenticeship agreements; issue rules and regulations necessary to carry out the purpose of Ch. 446 and perform such other functions as may be necessary in the effective administration of such chapter (§446.08, F.S.).

The council is directed to appoint a secretary of apprenticeship and employ necessary clerical, technical and professional help to effectuate the purpose of said chapter, "all of whom shall be employed in accordance with the merit system of the industrial commission." The secretary, under *supervision of the council*, is authorized to administer the provisions of said chapter; in cooperation with local joint apprenticeship committees, to set up conditions and training standards for apprentice agreements; to act as executive secretary of the council; to register apprentice agreements which meet the standards established by the council; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship in accordance with the council's standards; and to perform such other duties as the council may direct (§446.09, F.S.).

The questions are answered as follows:

1. The chairman of the apprenticeship council may not appoint a secretary of apprenticeship. Only the council may make such appointment. Such chairman could employ other necessary personnel under the direction and in pursuance of policies and instructions of the council adopted at a lawfully assembled meeting of the council. In the absence of such authority, the chairman should not employ such persons.

2. The apprenticeship council can function as such only in a lawfully assembled meeting with a quorum present. Hence, this question is answered in the negative.

3. For the reasons set forth in the preceding answer, this question is answered in the negative.

4. Members of governmental administrative bodies may lawfully function only if they are present in a regularly constituted meeting. Hence, this question is answered in the negative.

5. Subject to the following further comments, the chairman of the council has no authority to make an interim appointment of a secretary of apprenticeship. Should the position become vacant, until the council could be assembled in a duly convened meeting to fill such vacancy, the chairman would be authorized to appoint some person temporarily to perform purely routine office duties incident to such position, as distinguished from other statutory executive duties of such secretary enumerated in §446.09.

6. The wording of the first paragraph of §446.09 is construed as placing not only "clerical, technical and professional help" but also the secretary of apprenticeship under the merit system of the industrial commission. Hence, this question is answered in the affirmative.

7. As we understand the request for opinion, the quoted part of this question is taken from "Florida Merit System Promotional

Examinations for Florida Industrial Commission Positions, announced March 24, 1951."

As noted above, the Chairman of Florida Industrial Commission is the Chairman of Florida Apprenticeship Council. The Council is charged with the duty of administering the provisions of Ch. 446. The secretary of apprenticeship and all other employees of the council are under the administrative direction of the council. The council functions in relation to its powers and duties under Ch. 446 in duly convened meetings at which a quorum of the voting members are present. In the absence of any provision in Ch. 446 on the matter of a quorum, the better rule seems to be that a quorum of the council consists of a majority of the members of the council possessed of full voting rights, thus excluding from the count the chairman and the "supervisor of trade and industrial education" (46 C.J. 1378, 1379, §8).

A consideration of \$446.08 leads to the conclusion that the Chairman of Florida Industrial Commission is a member of and chairman of the council for purposes other than to function only as a presiding officer at duly called meetings; and that he is possessed of all of the powers, privileges and duties usually recognized as incident to the chairmanship of a governmental administrative body of this nature. In the absence of the council in meeting duly assembled, the duty rests upon him to act in its place and stead in an administrative capacity, but entirely within the limits of the directions and policies of the council duly announced and enacted in legally convened meetings. Hence, it would seem, as so conditioned, the secretary of apprenticeship is under the administrative direction of the Chairman of the Florida Industrial Commission in that official's capacity as a member and Chairman of Florida Apprenticeship Council.

PRIVATE EMPLOYMENT AGENCIES

July 27, 1951—051-242.

ARTISTS' REPRESENTATIVES—PRIVATE EMPLOYMENT AGENCIES—REGULATIONS

QUESTION: From time to time Florida Industrial Commission is required to construe the Private Employment Agency Law (Ch. 449, F. S.) with respect to theatrical agents or agencies operating in this state. These agents or agencies provide a booking service for theatrical talent performing in this state. This booking is accomplished by telephone, telegraph, correspondence and personal appearances or conferences of representatives of such agents or agencies with various Florida night club and hotel owners and operators. The agents or agencies or their officers or employees, representing theatrical artists, from time to time come into the state and negotiate with such night club and hotel owners for the latter's procurement of the services of such artists. These agents or agencies do not maintain offices or permanent representatives in this state. The services performed by such agents or agencies are set forth more in detail below. Are these agents or agencies private employment agencies, as contemplated by Ch. 449, F. S., and as such, are they required to secure a license under the provisions of said chapter?

To: *Honorable Rodney Durrance, Director, Workmen's Compensation Division, Florida Industrial Commission:*

The question derives with respect to three specific organizations, viz., Music Corporation of America (and its subsidiary, MCA Artists, Ltd.) Wm. Morris, Inc., and General Artists Corporation. In relation to this question, these organizations are represented by DeCostas, Mair & Floyd, Attorneys, Miami, Florida, who maintain to the Commission that such organizations are not private employment agencies under Ch. 449, and have filed a memorandum with the Commission in support of their position. While the question above is general, to avoid future confusion or misunderstanding, this opinion is limited to the activities of these organizations in relation to Ch. 449.

As indicated, Ch. 449 deals with the regulation of private employment agencies. Section 449.01 (1) defines such an agency as any person, firm or corporation, who for hire or profit, shall undertake to secure employment or help, "through the medium of a card, circular, pamphlet or other medium whatsoever, or through the display of a sign or bulletin, or by any other holding out to the public, offers to secure employment or help, or give information as to where employment or help may be secured . . ."

Section 449.01 (4) defines "theatrical employment agency" as including the business of conducting "an agency, bureau, office or any other place, for the purpose of procuring or offering, promising or attempting to provide engagements for persons who want employment in the following occupations: Circus, vaudeville, theatrical and other entertainment, or exhibitions, or performances or of giving information as to where such engagements may be procured or provided, whether such business is conducted in a building, on the street, or elsewhere."

Section 449.01 (5) defines the term "theatrical engagement" as including "any engagement or employment of a person as an actor, performer, or entertainer in a circus, vaudeville, theatrical or any other entertainment, exhibition or performance."

Section 449.08 deals specifically with the regulation of theatrical employment agencies.

Accompanying the request for opinion is an AGVA (American Guild of Variety Artists) standard form of artists' engagement contract. Noted on the form are the following: "A branch of the Associated Actors and Artists of America," and, "Affiliated with the American Federation of Labor." It seems unnecessary to set forth in detail the terms and conditions of such contract; it is sufficient to state it deals with theatrical engagements within the contemplation of Ch. 449. It is assumed that the organizations here dealt with use the same form of contract with respect to engagements of their clients.

Attorneys for the above-named organizations in their memorandum urge that the functions of these organizations in relation to their clients do not come within the purview of the regulatory features of Ch. 449; and their position in this respect is summarized as follows:

That these organizations function as theatrical artists' managers and in connection therewith engage in the occupation of

advising, counseling or directing such artists in the development or advancement of their professional careers; that as incidents to such managerial functions and in connection with the same, these organizations negotiate, or assist their clients in negotiating, for engagement contracts between their respective clients and prospective users of such clients' artistic services; that there are pronounced differences between the functions of such artists' managers and those of a typical commercial employment agency as well as between the classes of persons represented by such artists' managers as compared with the class of labor and other help contemplated by the regulatory provisions of Ch. 449; that in most instances the clients of said managers and representatives are not residents of Florida, but are merely performing engagements in Florida while on tour, location, etc., and, therefore, are not included in that class of persons which the provisions of Ch. 449 are primarily designed to protect, namely, Florida residents; that it appears evident it was the legislative intent and purpose that this Florida law regulating employment agencies be applicable to typical commercial employment agencies and not artists' managers; that said artists' managers and representatives are regulated and governed by various guilds and unions having jurisdiction over the clients represented by such managers, which regulations require the maintenance by said managers and representatives of certain high standards and fiduciary obligations therein imposed; that the Florida regulatory law governing employment agencies is in conflict with these guild and union regulations as well as in conflict with the terms and provisions of existing long-term contractual relations between said managers and representatives and their respective clients; that by reason of the foregoing it would be both a legal and practical impossibility for said artists' managers and representatives to function in Florida under said Florida laws and regulations governing employment agencies.

It is recognized that the functions of these artists' managers and representatives go beyond the services performed by them in obtaining bookings for their clients; nevertheless it appears that the booking services rendered by these managers and representatives are services contemplated by the regulatory provisions of Ch. 449.

(1) An examination of the records in the office of the Secretary of State evidences that neither of these corporate agencies is incorporated under the laws of Florida. In order for a corporation to be licensed under the provisions of Ch. 449, by the express terms of §449.02 (2) it "must be organized and authorized to do business under the laws of the State of Florida." Thus it appears that neither of these corporate agencies is eligible for licensing under the provisions of Ch. 449.

(2) If the activities of these corporate agencies in behalf of their clients in obtaining bookings with Florida concerns is confined solely to the media of interstate channels of communication, then neither of these corporations is subject under any circumstances to this Florida regulatory law. On the other hand, if in obtaining such bookings, officers, employees or agents of said corporate agencies personally negotiate with prospective Florida em-

players for bookings for the clients of such agencies, such may constitute the engaging in business in Florida by said agencies. Under the terms of Ch. 449 these agencies are not authorized to engage in such booking service in Florida if in doing so the agencies actually engage in business in this state. It is noted in the statement in connection with the question that from time to time these booking engagements are the result of negotiation in this state between representatives of such agencies and night club and hotel owners in Florida. It is further noted in the memorandum filed by the attorneys for these agencies that the presence of representatives of such corporate agencies in this state in behalf of such agencies' clients is usually required only on a sporadic basis. Whether or not the activities of representatives of these corporate agencies in Florida in connection with obtaining bookings for these agencies' clients constitutes engaging in business in Florida is a matter which cannot be decided on the scant information set forth in the request for opinion and other data which accompanied it. That question cannot be answered with any degree of safety unless a detailed showing of the activities of these agencies in obtaining Florida bookings for their respective clients is made available.

CHAPTER XXX

PROFESSIONS AND VOCATIONS

PHYSICIANS

June 9, 1952—052-179.

PRACTICE OF PSYCHOLOGY AS PRACTICE OF MEDICINE

QUESTION: Is a person practicing medicine in this State who gives advice and suggestions on mental treatment and uses psychology in giving such treatments, but who prescribes no drugs or medicines or physical treatments?

To: State Board of Medical Examiners, Miami, Florida:

In effect this question presents the issue of whether or not the use of psychology, in trying to correct mental disorders or conditions, amounts to the practice of medicine within any of the several medical practice statutes in this State. (see §§458.13, 459.01, 460.11 and 462.01, F. S.). Generally the practice of medicine in this State includes those who diagnose, treat, operate or prescribe for human ills, pain, injury, deformity or physical condition (§458.13, F. S.). Diseases of the mind have in recent years become recognized as a human illness and have been said to be within the general term "sickness" (44 C. J. S. 11 and 38, §2). W. R. Smith, in his book on Medical Jurisprudence at page 22, with respect to mental diseases, says that "the great majority of medical men are themselves in the position of laymen. They have not studied it. It was not included in their examination; it was a thing outside their curriculum—a thing apart, having little community of nature or similarity of character with the subjects of their professional studies." Doubtless the study of medicine as the years pass includes more and more study and consideration of mental diseases. Many doctors are or will specialize in mental diseases and their treatment.

In our study of the subject we have obtained from the American Medical Association, the staff of the Florida State Hospital, and other persons valuable information and observations on the question of mental diseases and their treatment. We have also examined works upon the subject. We have examined an article on the "Regulation of Psychological Counseling and Psychotherapy," appearing in the Columbia Law Review of April 1941 (Volume 51, page 474). Psychology has been defined in dictionaries as the science that treats the mind in any of its aspects or as the systematic knowledge and investigation of the phenomena of consciousness and behavior. Doubtless there is a point where professional treatment of emotional distress, whether referred to as psychology or otherwise, moves over into the practice of medicine; however, this point appears to be difficult, if not next to impossible, of adequate determination. Where advice and suggestion are used with the view of overcoming some abnormal condition of the mind, whether referred to as psychology or otherwise,

there would appear to be a point where such treatment would pass into the field of the practice of medicine in some of its branches. Psychological treatment that might be beneficial or harmless to one abnormal mind might prove harmful to another. Psychology doubtless has a place in the treatment of diseases of the mind as well as mental conditions. The condition of the mind of a sick person doubtless has a bearing upon his treatment and may have to be overcome before treatment will be fully effective.

The field of psychology is a broad one and one that is used in many fields of endeavor. It has a place in our schools and educational fields. Psychology is broader than the field of medical practice, although it has its place in the field of medical practice. We feel that persons attempting to treat diseased or abnormal minds should have some professional training so that their attempted treatment of abnormal conditions of the mind will not become harmful to the person treated. Psychology practiced on one person might not be harmful, although the same treatment of another might be. Although we do not think that psychology is to be generally classified as the practice of medicine, we also feel that its practice may under proper conditions invade the field of medical practice.

We do not think that the practice of psychology generally is to be classified as the practice of medicine and within the purview of §205.051, F. S., so as to require tax collectors to demand proof of qualification under some of the medical practice acts. However, we do feel that the practice of psychology may under some circumstances invade the field of medical practice so as to become a violation of our medical practice acts or one of them and constitute the practice of medicine. This question is one that must be determined from the facts surrounding each particular case. It should be considered as the exception and not the rule. Those charged with the enforcement of our medical practice acts are authorized to prevent medical practice by psychologists whose treatments invade the field of medical practice, at least so long as we have no statutory regulation of the practice of psychology in this State.

June 25, 1951—051-180.

PROFESSIONAL MEN—FELONY CONVICTIONS—LICENSE REVOCATION—REINSTATEMENT—CIVIL RIGHTS RESTORATION

QUESTION: A professional man holding a license as a medical doctor, osteopathic doctor, chiropractic doctor, naturopathic doctor or a pharmacist who has been convicted of a felony and his license suspended or revoked makes application at a later date for reinstatement. Inasmuch as a conviction of a felony causes a person to lose his civil rights, could these professional boards restore such license and all privileges when the convicted person has not had his civil rights restored?

To: Honorable M. H. Doss, State Bureau of Narcotics, Florida State Board of Health, Jacksonville, Florida:

Apparently the language of §461.03 F. S., would preclude any person who has been convicted of a felony from being licensed

to practice chiropody in Florida. Your question therefore, in so far as it pertains to chiropodists, is answered in the negative.

Chapter 460, F. S., which provides for the qualifications required of persons to practice chiropractic, contains no specific prohibition against the licensing of persons convicted of a felony but does require evidence that they are of good moral character and reputation (§460.07). Apparently in this instance it is discretionary with the Florida State Board of Chiropractic Examiners as to whether or not conviction of a felony is sufficient grounds for refusal to license a person to practice chiropractic in Florida.

Section 466.24, F. S., provides for the mandatory suspension or revocation of licenses to practice dentistry of persons guilty of gross immorality and various other offenses. In my opinion, the term "gross immorality" would include conviction of a felony. Consequently, I believe that with regard to dentists, your question must be answered in the negative.

Section 462.14, F. S., provides, in part:

"The license or registration of a practitioner of naturopathy may be revoked, suspended or annulled, or such practitioner may be reprimanded, upon the following grounds:

...

"(2) That he has been convicted of a felony."

Since the language used in this statute is permissive, your question is answered in the affirmative with regard to its application to the practice of naturopathy.

Section 459.14, F. S., provides, in part:

"The board may either refuse to issue or may suspend or revoke any license for any one or any combination of the following causes:

"(1) Conviction of a felony, as shown by a certified copy of the record of the court of conviction."

The language used here is permissive and not mandatory.

Your question is answered in the affirmative in so far as it concerns the practice of osteopaths.

Section 458.12, F. S., provides, in part:

"The license or registration of a practitioner of medicine may be revoked, suspended or annulled, or such practitioner reprimanded upon the following grounds:

...

"(2) That the physician has been convicted in a court of competent jurisdiction of a felony. The conviction of a felony shall be the conviction of any offense which if committed within the state of Florida would constitute a felony under the laws thereof."

Since the statute leaves revocation of a physician's license to practice on the grounds of conviction of a felony, to the discre-

tion of the Board, your question is answered in the affirmative as applied to a practitioner of medicine.

Section 465.06, F. S., provides grounds for withholding registration or revoking a certificate to engage in pharmacy in Florida. The powers granted the Pharmacy Board are permissive and not mandatory. Your question, therefore, is answered in the affirmative with regard to pharmacists.

November 5, 1951—051-401.

**FLORIDA STATE BOARD OF HEALTH—PHYSICIANS—
EMPLOYMENT—MEDICAL ASSOCIATIONS AND GROUPS
—MEMBERSHIP DUES—REIMBURSEMENT**

QUESTION: Can physicians employed by the Florida State Board of Health be reimbursed by the State of Florida for membership dues paid by them to various medical associations and groups, where such physicians by virtue of their employment find it mandatory to belong to said associations and groups?

To: Honorable Rhydon C. Latham, Attorney, Jacksonville, Florida:

This office has rendered opinions to the effect that certain public officials could pay limited membership fees or dues to voluntary associations of officials, which associations could reasonably be said to be of value to the public service as related to the offices or duties of such public officials. See opinion of Attorney General Landis relating to County Commissioners' State Association dues (Biennial Report, 1935-36, page 236) and my opinion numbered 051-303 relating to payment of dues by sheriffs to Sheriffs' State Association.

Courts have also ruled that the attendance of public officers upon meetings and conferences held with other officers of other jurisdiction for the purpose of discussing and settling problems of mutual interest, constitute a proper expense payable out of public funds as having been performed in the course of official duties. For example, in the case of *Adams vs. Lott*, 112 Fla. 49, 150 So. 596, our Supreme Court held that a board of county commissioners could pay the expense of having any of its members attend the state road department public hearings to offer suggestions or complaints as to why the budget should include repairs to the roads or bridges in their counties.

The rulings and decisions referred to above have not been extended to membership dues in professional associations, such as medical associations or bar associations. Usually such dues are mandatory qualification requirements which relate to all members of the profession whether they are in governmental service or not. In your question you indicate the medical dues are mandatory.

As related to your question, there is I think, a difference in categories of associations. One is a purely professional relationship; the other is a relationship where public officials with mutual problems are organized to more effectively cope with such problems. This latter relationship has a direct connection with and is created solely for governmental or official purposes, whereas in

the former the purpose is mainly for professional purposes relating to the qualifications of the individual member.

If you can produce information showing that the association is one of public health officials, dedicated to public health and related problems, my answer might well be different. But as the question is submitted, I feel constrained to answer it in the negative. Your question is answered accordingly.

CHIROPRACTIC

April 6, 1951—051-83.

CHIROPRACTORS—FOODS, FOOD CONCENTRATES, FOOD EXTRACTS—USE OF

QUESTION: Do persons licensed to practice chiropractic in this state under Ch. 460, F. S., have the legal authority to administer foods, food concentrates and food extracts other than orally, such as subcutaneously, intra-venously, intramembraneously or intramuscularly?

To: Dr. Daniel K. Kirk, Secretary-Treasurer, State Board of Chiropractic Examiners:

Section 460.11 (2) (b), F. S., provides in pertinent part that "chiropractors may adjust, manipulate or treat the human body by manual, mechanical, electrical or natural methods, or by the use of physical means, physiotherapy (including light, heat, water or exercise) or by the use of foods and food concentrates, food extracts, . . ."

The answer to your question depends upon the interpretation of the word "use" as contained in the above quoted statute. The statute does not specifically indicate in what particular manner such food extracts or concentrates may be used or administered. Essentially, then, the question is whether the statute contemplates that such food products are to be administered orally only, or whether other recognized methods of administering foods to the human body can be utilized by chiropractors.

The word "use" is of broad scope and definition. It means to make use of; to convert to one's service; to employ; to avail oneself of; to put into operation; to cause to function; to apply (See Vol. 43, Words & Phrases, page 463, et seq.). Accordingly, there seems no legal basis to assume that the word, as used in the statute, meant to imply oral use only, in the absence of anything tending to indicate such restrictive application of the word.

Therefore, since I can find nothing in Ch. 460, or other statutes expressly prohibiting the use of foods by means other than through the mouth, or even tending to indicate any restrictive definition of the word "use," the ultimate answer to your question would, in my opinion, depend largely upon whether or not members of the chiropractic profession are qualified by reason of their education and experience to introduce said substances by the other processes mentioned. Since the administration by subcutaneous, intravenous, intra-membraneous or intra-muscular methods requires a certain specialized knowledge over and above that required for

oral introduction, it would seem logical to conclude that such methods should be employed only by persons having training in that particular technique. Whether or not a licensed chiropractor is technically qualified to give injections, or to employ the particular methods of using foods, food extracts or concentrates here under discussion, is a matter for professional determination by your Board, rather than this office, in my opinion. From a legal standpoint, however, it appears that the term "use" as contained in the governing statute is sufficiently broad to include methods other than oral introductions, provided the chiropractor is technically qualified to employ such other means.

Accordingly, in view of the broad application of the word "use" in the statute, and in the absence of any indication that such word was intended to mean only oral use, it is my opinion that licensed chiropractors have the legal right to use foods, food concentrates and food extracts in the treatment of the human body by the various means set forth in the question, provided such chiropractors are technically qualified to employ such methods.

June 11, 1952—052-183.

CHIROPRACTOR—TONSILLECTOMY—ELECTRICAL SHORT WAVE DIATHERMY—SURGERY

QUESTION: Would the removing of tonsils by a Chiropractor using Electrical Short Wave Diathermy be considered as "surgery" as thus within the prohibition of §460.11 (2) (b) F. S.?

To: Dr. Daniel K. Kirk, Secretary-Treasurer, Florida State Board of Chiropractic Examiners, Jacksonville, Florida:

The answer to the above question must necessarily be based upon an interpretation of certain subsections of §460.11, F.S., defining the principle and practice of chiropractics.

Subsection (2) (a) of §460.11 F. S. would not be applicable to the instant case inasmuch as it enumerates only the methods by which a chiropractor may "examine, analyze, and diagnose" the human living body and the removal of tonsils would not come within any of those three categories. Subsection (2) (b) describes the manner in which a chiropractor may "treat the human body, but expressly prohibits the performing of "any surgery except as hereinabove stated." However, the exception to the prohibition would seem to be superfluous inasmuch as there appears to be no instances of surgery "hereinabove stated" which a chiropractor is allowed to perform.

The most practical and reasonable definition of "surgery" I have found is contained in a California case which, appropriately enough, involved a statute regulating the practice of chiropractics in terms much the same as our statute. It was there held that the words "medicine" and "surgery", as used in §7 of the Chiropractic Act, were intended to deny chiropractors "the use of drugs and medical preparations and the severing or penetrating of the tissue of human beings" (Italics supplied) See *People v. Fowler*, 84 P. 2d. 326, 333. As I understand it the Electrical Short Wave Diathermy method of removing tonsils would involve the use of an electric

needle to induce heat in those organs and cause what is termed a "coagulation" of them—a process or treatment which is very similar to the manner in which warts are removed from the epidermis. As in the case of the removal of warts, I assume that the removal of tonsils by this method would call for post-removal treatment to insure against infection. In any case, it is hard for me to conceive of any way in which tonsils could be removed without actually severing or penetrating the tissues, unless like some warts, they can be "conjured" off.

It is my opinion that the definition of "surgery" as given in the above case establishes an excellent criteria for determining whether any method of treating a person constitutes surgery within the meaning of §460.11, F.S. Such definition is neither long, involved, nor technical. Therefore, if my understanding of the Electrical Short Wave Diathermy method of removing tonsils is correct, such method comes within the term "surgery" and is prohibited by said section of Ch. 460.

October 29, 1952—052-304.

CHIROPRACTORS—PRACTICE IN BAY COUNTY MEMORIAL HOSPITAL

QUESTION: If Ch. 27396, Laws of 1951, is ratified by the voters of Bay County in the general election to be held November 4, 1952, will it permit chiropractors to practice in the Bay County Memorial Hospital?

To: *Dr. R. Philip Coker, Chairman, Florida State Board of Osteopathic Examiners, Panama City, Florida:*

Chapter 27396, Laws of 1951, provides, among other things, that:

"In any hospital or hospitals supported in whole or part by taxes collected in Bay County, Florida and operated in Bay County, Florida, all citizens and taxpayers of Bay County, Florida, shall have the right to be admitted to such hospital or hospitals, and in the management of such hospital or hospitals no discrimination shall be made against any physician or surgeon, *provided such physician or surgeon has been admitted to the general practice of medicine or surgery under the laws of the State of Florida*, and all such physicians or surgeons shall have equal privileges in treating patients in said hospital or hospitals"

In as much as *chiropractors* have not been admitted to the general practice of medicine or surgery under the laws of the State of Florida, as required by the act, your question is answered in the negative.

CHIROPODY

August 14, 1952—052-251.

CHIROPODY EXAMINERS—APPLICANTS FOR EX- AMINATION—QUALIFICATIONS

QUESTIONS: 1. Under §461.03, F.S., is it the intent of

the law to permit applicants who are three year graduates, and who take the examination prior to January 1, 1953, for license to practice Chiropraxy, to retake the examination?

2. Can anyone apply between now and January 1, 1953, for examination on the basis of having been a three year graduate?

3. If a person has been graduated from a school which required less than the four years at the time of his or her graduation—subsequently re-enters and supplements his collegiate training for a total of four years—is that person eligible under the law to apply for examination? We are presuming that the person so supplementing his schooling receives a degree from the latter school?

To: Dr. Joy E. Adams, Secretary-Treasurer, State Board of Chiropraxy Examiners, St. Petersburg, Florida:

In reply to question one, it is my opinion that any applicant who has completed a three year course of study, and meets the other qualifications prescribed by law, is entitled to take the examination *provided such application is made prior to January 1, 1953*. It is further my opinion that any applicant *so applying*, but who fails to pass the examination shall be entitled to a re-examination as provided in §461.03, regardless of whether the re-examination is given prior to January 1, 1953, or not. This appears to answer your first question.

Your second question is answered in the affirmative.

In view of §461.03, F. S., it is my opinion that your third question should be answered in the affirmative.

NURSING

July 27, 1951—051-225.

FLORIDA STATE BOARD OF NURSE REGISTRATION— QUORUM—PHYSICIANS—PRACTICAL NURSES— LICENSE QUALIFICATIONS

QUESTIONS: 1. How many members of the Board shall constitute a quorum for the transaction of business?

2. Who is considered a physician other than a M.D.?

3. What type of certificate or license shall be issued under §6A? Further explain §6A.

4. Should the certificates previously issued to the practical nurse group legally termed "Licensed Attendant" under the old law be recalled and new certificates bearing the new title "Licensed Practical Nurse" be issued? If so, will this have to be done at no charge to the licensee?

5. Is it necessary for a doctor's office girl, who is employed as receptionist, nurse, laboratory and X-Ray technician to obtain a license as a practical nurse?

6. Is it legal for the Board to continue charging Schools of Nursing the \$10 annual accreditation fee?

7. Should applicants for a license as a practical nurse whose application was completed and were notified of their eligibility for

the licensing examination in June 1951, be required to pay the additional fee of \$10 when filing application under Ch. 26797?

To: Honorable Delcie C. Inglis, R. N., Secretary-Treasurer, Florida State Board of Nurse Registration and Nursing Education:

Section 3 (3) of Ch. 26797, Laws of 1951, provides that three members of the Board, including one officer, shall constitute a quorum for the transaction of *all* business. I interpret this to mean that only three members of the Board are required to be present to constitute a quorum, provided one of the three members present is an officer of the Board. This answers your first question.

Sections 4 (5-C) and 5 (4-C) of Ch. 26789 provide that the application must be endorsed by two licensed physicians who have personal qualifications. In view of the fact that the Nurse's Board will be called upon to license nurses employed by all types of doctors, dentists, etc., and that all types of such doctors will be called upon by applicants for registration to endorse applications because of their personal knowledge of the applicants' qualifications, I think that all types of doctors, dentists, etc., employing nurses may be considered physicians eligible to endorse the application as contemplated by §§4 (5-C) and 5 (4-C) of the Nurse Practice Act. This answers your second question.

Section 6A appears to be what is known as the "grandfather" clause of the Act and only applies to persons who are now practicing nursing and have been for a period of two years. It is a provision to allow persons already practicing and eligible to be registered to do so without meeting the requirements of §§4, 5, and 6. Persons who can qualify under this §(6A) have 60 days from the effect date (May 30, 1951) of the Act to obtain their certificate of registration. The type of certificate to be issued by the Board depends entirely upon what *class of nursing* the applicant has been engaged in. By type of certificate, I refer to either a practical nursing certificate or a registered nursing certificate. The responsibility for determining this is upon the Board and the decision should be based upon the facts in each individual case. The responsibility for obtaining the proper certificate as to qualifications from the local medical association is upon the applicant.

Replying to question four, I do not think it necessary to recall previously issued certificates in order to change the term "Licensed Attendant" to "Licensed Practical Nurse", in view of the fact that §5 (3) of Ch. 26797, recognized the validity of such certificates by providing that "Any person holding a license or certificate of registration to practice nursing as a licensed attendant issued by the State Board of Examiners for Nurses which is valid on July 1, 1951, shall be deemed to be a licensed practical nurse under the provisions of this act." However, if the Board desires to notify such persons that a new license or certificate will be issued to those that wish to exchange certificates, it may do so, but I do not think a fee should be charged for this service.

Replying to question five, it is my opinion that a doctor's office girl who is employed as a nurse, laboratory and X-Ray technician or performs such other acts of nursing as outlined in the letter of Dr. Grayson C. Snyder, M. D., (which is attached to your re-

quest for opinion) wherein he states that his office girl gives injections, etc. under his supervision, should be registered as a practical nurse. It is further my opinion that such a certificate of registration may be issued under §6A if the applicant meets all requirements therein contained.

I do not find anything in the law that authorizes the Board to charge Schools of Nursing a \$10 annual accreditation fee. I am inclined to think that the services rendered the Schools of Nursing by the Board is a part of the policing duties of the Board and no charge not expressly authorized by the statute should be made. Neither did I find anything in the old law authorizing the Board to assess this fee. Your sixth question is answered in the negative.

It is my opinion that question seven should be answered in the affirmative if the Board requires the applicant to file a new or additional application under Ch. 26797.

DENTISTRY AND DENTAL HYGIENE

April 9, 1952—052-119.

COUNTY HEALTH UNITS—DENTAL INTERNSHIPS

STATEMENT and QUESTION: The Florida State Board of Dental Examiners has been asked to allow dental internships in county health units such as the Hillsborough County Health Department.

The Board wishes to ask your opinion if such an internship would meet the requirements as stated in §466.41 of Ch. 466 F. S.

To: *Honorable A. W. Kellner, Secretary-Treasurer, State Board of Dental Examiners, Hollywood, Florida:*

In my opinion, a county health unit does not constitute a "state maintained and operated hospital" within the meaning of §466.41 quoted above.

Your question is therefore answered in the negative.

PLUMBERS

October 16, 1951—051-362.

FLORIDA PLUMBING CONTROL ACT—PLUMBING CONTRACTORS—SURETY BONDS—EXPIRATION DATE

QUESTION: Does the surety bond prescribed for plumbing contractors under §3 of Ch. 26904, Laws of 1951, known as the Florida Plumbing Control Act of 1951, automatically expire at the end of the license year, unless renewed or a continuation certificate issued?

To: *Hon. J. Edwin Larson, Insurance Commissioner:*

Section 3 of Ch. 26904, Laws of 1951, known as the Plumbing Control Act of 1951, provides that where applicable, a plumbing contractor must give bond in the sum of \$5,000, payable to the Governor of the State of Florida, conditioned upon the person complying with the minimum requirements of the State Plumbing

Code in regard to all plumbing done by said person in this state. The form of bond is substantially set forth in the law, which provides, "The premium anniversary date of this bond shall be on the first day of October of each year, the first anniversary being October 1, 1951."

The question here before us is whether this bond is to be considered as terminating on October 1 of each year thereby requiring renewal or the issuance of a continuation certificate in order to maintain the liability of the surety company on the bond, or whether the bond is to be considered as a continuous instrument subject to cancellation by the contractor or the surety company.

In my opinion No. 051-309, dated September 7, 1951, copy of which is attached, I held that the obtaining of this bond was a prerequisite to the securing of an occupational license, in those counties where the law is applicable, and that the license issuing authority should ascertain that such bond has been posted prior to issuing such a license. Since the occupational license expires as of October 1 of each year, it would therefore appear necessary for plumbing contractors to show evidence of a current effective bond each October 1 when a new license was obtained. It seems to follow, then, that it was the intent of the law that the bond would expire with the expiration date of the license, unless renewed or a continuation certificate issued.

Accordingly, it is my opinion that the bond would terminate on October 1 of each year and the liability of the surety company would be ended as to further acts of the plumber after that date, unless the bond were renewed or a continuation certificate issued. Your question is therefore answered in the affirmative.

FUNERAL DIRECTORS AND EMBALMERS

May 15, 1951—051-112.

FUNERAL DIRECTOR AND EMBALMER—AS INSURANCE AGENT—QUALIFICATIONS—LICENSES

QUESTION: Under the laws of this state may a person duly licensed as a funeral director and/or embalmer at the same time be licensed as a fire and casualty insurance agent?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Chapter 470, F. S., regulates funeral directors and embalmers qualifications for license as such are set forth in §470.08. There appears to be no feature of Ch. 470, particularly §470.08, prohibiting a person from being licensed at the same time as a funeral director and/or embalmer and a fire and casualty insurance agent.

Section 638.16, F. S., among other things, in effect prohibits "a funeral director or undertaker" from acting as agent for any insurer issuing contracts of life or sick and funeral benefit insurance.

The qualifications and licensing of fire, marine, casualty or surety insurance agents are prescribed by certain sections of Ch. 627, F. S. There appears to be no prohibition in these sections of our law against a person who is a licensed funeral director and/or

embalmer from also being licensed as a fire and casualty insurance agent.

Hence, the question is answered in the affirmative; that is to say, that a person licensed as a funeral director and/or embalmer may at the same time be licensed as a fire and casualty agent, provided he otherwise meets the requirements of the relevant sections of Ch. 627 pertaining to the qualifications and licensing of such an insurance agent.

VETERINARIANS

February 7, 1952—052-32.

STATE BOARD VETERINARY EXAMINERS—APPLICANTS—LICENSES

QUESTION: Does the State Board of Veterinary Examiners have the authority to issue a permit or a license to an applicant who has not successfully passed the State Board examination in a situation where the applicant lives in an isolated community where there is no licensed veterinarian?

To: Honorable C. Paul Vickers, Secretary-Treasurer, State Board of Veterinary Examiners:

Section 474.02, F.S., provides that all persons *before* entering upon the practice of veterinary medicine and surgery in this state shall be required to pass an examination conducted by the Board of Veterinary Examiners and after passing such examination and otherwise complying with Ch. 474, F.S., the person may be issued a license by the said Board.

Section 474.04, F.S., relates to the qualifications of an applicant to take the examination offered by the State Board of Veterinary Examiners and provides in part that the applicant shall be a graduate of a veterinary college recognized by the American Veterinary Medical Association, that he must make application in writing to the State Board of Veterinary Examiners and set forth in the application the grounds upon which it is based, such as the name of the college from which he graduated, etc., attaching a copy of his diploma and certifying application with an affidavit that the material and matter contained therein is true and correct.

I find nothing in the statute which allows the Board of Veterinary Examiners to grant a permit or license to anyone prior to the time the person or persons pass a satisfactory examination.

Chapter 458, F.S., relating to physicians, provides for the issuance of a temporary license to an applicant until the next regular meeting of the Board, at which time the license becomes void and undoubtedly such a provision is a wise one from several viewpoints, some of which are that it takes care of certain emergencies comparable to the one set out in your letter and it allows an accumulation of applications which the Board may consider at one time, but I find no such provision in the veterinary science law and therefore your question is answered in the negative.

BARBERS

March 16, 1951—051-58.

BARBERS' SANITARY COMMISSION—BARBERS' APPLICATIONS FOR CERTIFICATES—QUALIFICATIONS

QUESTION: Does the Barbers' Sanitary Commission have authority to allow a person to take the examination for a Certificate as provided by §476.05, F.S., where such person is a graduate of an approved School of Barbering as provided by §476.06, F.S.; where such person has served a period of at least 18 months as a barber in the Armed Forces of the United States, but not a "registered apprentice," as provided by §476.05 (3), due to the fact that at the time of the said apprenticeship, he was not a graduate of a School of Barbering approved by the Commission, as provided by §476.06, F. S.?

To: Honorable Pryor P. Young, Chairman, Barbers' Sanitary Commission:

Section 476.05 (3), F.S., provides:

"Who has practiced as a registered apprentice for a period of eighteen months under the immediate personal supervision of a registered barber."

From the facts stated in your letter, it does not appear that the applicant can comply with the above quoted provision. Your question is therefore answered in the negative.

December 19, 1952—052-330.

DISABLED VETERANS—BARBER'S LICENSE—EXEMPTIONS

QUESTION: Is a disabled veteran who is exempted from paying an occupational license also exempted from paying an original and an annual registration fee as now required to practice barbering?

To: Miss Mary Lou Perkins, Secretary, Barbers' Sanitary Commission:

The certificate of registration fee required by §476.10, F.S. and the annual renewal registration fees provided for in §476.13, F.S., relative to barbering are not occupational fees. They are fees required of those who have qualified to practice barbering and are issued pursuant to the provisions of Ch. 476, F.S., creating the Barbers' Sanitary Commission.

An occupational tax is primarily intended to raise revenue for the support of the government and imposed for the privilege of engaging in a business or occupation. A license or registration fee is intended as a means of, or aid to, regulation.

"To exempt a class of persons from an occupational tax will not also exempt them from a license tax used to pay the expenses of testing their qualifications and to enforce regulations intended to protect the health of the public." C.J.S. 53, page 602.

Section 205.13, F.S., provides for additional fees or licenses, paid to any board for registration, examination, inspection or other regulatory purposes in addition to and not in lieu of any occupational tax now required unless expressly provided by law.

The power to regulate barbering as an occupation includes the power to license and it is the settled general rule that to protect the health and welfare of the public, a state can license an occupation, trade or calling. Am. Jur. 33, page 336.

Your question is therefore answered in the negative.

FLORIDA BEAUTY CULTURE LAW

March 13, 1952—052-83.

NON-RESIDENT VETERANS—LICENSES—EXAMINATIONS —EXEMPTIONS

QUESTIONS: 1. Is the State Board of Beauty Culture required to license, without examination, a veteran who is a non-resident of Florida and who has never practiced Beauty Culture in the State of Florida?

2. Is such a veteran exempted from paying the examination fee as required by §477.17?

To: Miss Ethel M. Manning, Executive Secretary:

Chapter 22914, Laws of 1945, provides that no examination shall be required of any veteran of the military services of the United States of America under any statute of the State of Florida, or any rule or regulation of any governmental agency, state, county or municipal, as a condition precedent to the right of such veteran to engage "again" in this state in any business, or pursue any occupation or profession, which such veteran was required to terminate, suspend or abandon by reason of his enlistment or draft with any branch of the military service of the United States of America.

It is my opinion that the foregoing statute was intended to include only those veterans who were engaged in a business, occupation, or profession in the State of Florida prior to their entrance into the armed forces. Accordingly, your first question is answered in the negative.

Sections 205.16 and 205.161, F.S., provide, among other things, that disabled veterans who are bona fide permanent residents of the State of Florida shall, upon sufficient identification and proof of being a permanent resident elector in the state, be entitled to an exemption of fifty dollars on any license to engage in any business or occupation.

It appears that the foregoing statute applies only to veterans who are bona fide residents of the State of Florida and the exemption referred to applies only to occupational license taxes. Examination fees cannot be held to be an occupational license. Your second question is answered in the negative.

OUTDOOR ADVERTISING

July 27, 1951—051-241.

DISABLED VETERANS—OUTDOOR ADVERTISING— LICENSE TAX EXEMPTION

QUESTION: Are disabled veterans exempt, under the provisions of §205.16, F.S., from the payment of the license fees to engage in the business of outdoor advertising imposed by §479.04, F. S., as amended by Ch. 26959, Laws of 1951?

To: Honorable Joe Burnett, Director, Division Outdoor Advertising, State Road Department:

Substantially this same question was previously presented to this office for opinion prior to the enactment of the 1951 amendment, and was answered by opinion No. 049-401, as supplemented by opinion No. 049-606, dated August 22, 1949, and December 23, 1949, respectively (see 1949-50 Biennial Report, pages 262 and 265), copies of which are enclosed. In those opinions I held that since the fees charged under §479.04, F.S., are occupational license taxes, the exemption extended to disabled veterans under §205.16, F.S., would be applicable, and that such persons would be exempt from the payment of both the state and county fees up to the sum of \$50 in each case.

The 1951 amendment to §479.04, F.S., in so far as fees are concerned, simply reduced the state fee for such licenses from \$75 to \$25 per annum for operating under the law in only one county, without otherwise altering the purpose for which such fees are charged, which, by the terms of the statute are "imposed for revenue for the use of the state." Hence, the ruling contained in my prior opinions would still be applicable, and a disabled veteran coming within the terms of §205.16, F.S., operating in only one county, would be exempt from the payment of both the \$25 state fee and the \$15 county fee prescribed by §479.04, as amended.

Your question is therefore answered in the affirmative.

MASSEURS AND MASSEUSES

April 17, 1951—051-88.

FLORIDA BOARD OF MASSAGE—SECRETARY-TREASURER—COPIES OF RECORDS—PUBLIC INSPECTION

QUESTIONS: "(1) Is the secretary-treasurer of the Florida Board of Massage required by law to furnish a copy of any of its office records to persons requesting the same?

(2) Is the secretary-treasurer of the Florida Board of Massage required to make a charge for the forwarding of any of its records to persons requesting the same?

(3) Are the files and other book records of the Florida Board of Massage public records that can be examined and inspected at any time by any person?"

To: Honorable George M. Burns, Secretary-Treasurer, Florida Board of Massage, Miami, Florida:

The last sentence of §480.14, F.S., is obviously incomplete. It is

certain that the legislature did not intend to require the secretary-treasurer of the Board to forward to any person making application therefor, "the fee to belong to the secretary-treasurer." When the legislative intent can be ascertained with reasonable certainty, words may be altered or supplied in a statute so as to give it effect and avoid repugnancy or inconsistency with intention, and there is a strong presumption against absurdity in statutory provision. *Ha-worth v. Chapman*, 113 Fla. 705, 152 So. 663.

It is reasonably certain that the legislative intent was that the secretary-treasurer forward to any person making application therefor, copies of the records of the Board as defined in §480.14, F.S. This being true, the law then requires the secretary-treasurer to perform this duty. The use of the word "shall" in the statute makes this duty mandatory.

Hence, it is my opinion that the secretary-treasurer of the Florida State Board of Massage is required by law to forward to any person making application therefor copies of the records on file in the office of the secretary-treasurer of the Board of Massage, as provided in §480.14, F. S.

QUESTION 2.

Section 480.14, F. S., authorizes the secretary-treasurer of the Board of Massage to make a charge of twenty-five cents per hundred words for copying records. This fee is to belong to the secretary-treasurer. To hold that the secretary-treasurer is *required* to make a charge for this service would seem strained, if not absurd. However, if the secretary-treasurer is allowed to charge or not to charge for copying records within his own discretion, then it is clear that the statute will not receive uniform application. It is my opinion that the secretary-treasurer is not bound by law to make a charge for copying records, but it is also my opinion that it would be far the better practice for the secretary-treasurer to make a uniform charge of twenty-five cents per hundred words copied, so as to prevent an arbitrary application of this statute.

QUESTION 3.

Section 119.01, F. S., reads as follows:

"All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen."

The records contained in the office of the secretary-treasurer of the Board of Massage are unquestionably state records and as such are open for a personal inspection of any citizen of Florida, subject to certain qualifications. In the case of *Lee v. Beach Publishing Company*, 127 Fla. 600, 173 So. 440, the Supreme Court modified §119.01, F. S., by holding that the right of inspection of public records does not extend to all public records or documents, for public policy demands that some of them, although of public nature, must be kept secret. The question of whether it would be against public policy to allow inspection of certain public records, is a question which must be decided by the custodian of the records, in this case

the secretary-treasurer of the Board of Massage. If the secretary-treasurer is in doubt as to whether it might be against public policy to allow inspection of certain records, he may avail himself of an opinion of the Attorney General. The citizen, of course, always has recourse under our declaratory judgment statute or in mandamus.

It is, therefore, my opinion that any citizen of Florida, who can show an interest in the records of the Board of Massage, has the right of personal inspection of the records in the office of the secretary-treasurer of the Florida Board of Massage, including newspapers and legislative committees, subject only to the aforementioned qualifications.

MEDICAL TECHNOLOGY

August 1, 1951—051-249.

BASIC SCIENCES—APPRENTICESHIP COUNCIL—BOARD OF EXAMINERS—APPROPRIATIONS

QUESTIONS: 1. May the State Budget Commission make provision for the operation of the Florida Apprenticeship Council, during the 1951-1953 biennium, by the release of \$15,000 per year (\$30,000 for the biennium) from the Emergency appropriation under Item 76, §1, Ch. 26859, Laws of 1951, or the General Appropriations Act?

2. Should the unexpended balance in the Medical Technology Fund (an agency fund) remaining on June 30, 1951, be carried forward into the first quarter of the 1951-2 fiscal year for the purpose of carrying on the educational program of the Board of Examiners in the Basic Sciences through September 30, 1951?

To: *Honorable Homer G. Graham, Director, State Budget Commission:*

Since receiving your request for opinion we have been advised that the State Budget Commission has released funds for the purposes described in the first question; this being true the question has become moot and should not be answered.

The Legislature, by Ch. 25069, Laws of 1949, (which became a law and took effect on May 16, 1949, and now appears as Ch. 483, F.S.,) provided for the regulation and control of the practice of medical technology in this State. Under §483.14, F.S., it is provided that "all moneys received by the board . . . shall be deposited with the State Treasurer in a special fund for the exclusive use of the board . . . all expenses of the board shall be paid out of this fund . . . any surplus of funds on hand at the end of any fiscal year, and not required for operating expenses during the first three months of the next fiscal year, shall be transferred by the board from this fund to the general revenue fund of the State of Florida."

Chapter 25068, Laws of 1949, which abolished all existing continuing appropriations, with certain exceptions, became a law on May 16, 1949, the same day that said Ch. 25069 became a law. We, therefore, have no evidence that the continuing appropriation contained in said Ch. 25069 (§483.14, F. S.,) was repealed by said Ch. 25068 (see 59 C. J. 928-30, §534). This continuing appropriation

appears to be in full force and effect unless repealed, suspended or superseded by some subsequent statute or law.

Item 71D, §1, Ch. 26859, Laws of 1951 (the current general biennial appropriations act), contains an appropriation in the sum of \$3,600.00 per annum, to the Board of Examiners in the Basic Sciences, for medical technology expenses, for the present biennium. Where there exists a continuing appropriation for a certain purpose, and there is subsequently provided a biennial appropriation for the same purpose, the general rule is that the continuing appropriation is superseded or suspended during the life of the said biennial appropriation (*McCracken v. State*, 41 Nev. 49, 167 P. 1001, text 1002). The 1951 general appropriations act, therefore, fixes the fund from which the medical technology expenses for the current biennium are to be paid, unless the fees to be collected under said Ch. 483, F. S., are to be classified as trust funds and within the purview of our opinion of July 31, 1951, to the State Budget Director.

In the light of these observations we think that the second question should be answered in the negative. There was presented to us no question as to the inability of the Board to carry on its work with the appropriation made by the 1951 Legislature, as to which see our opinion to the State Budget Director of July 31, 1951.

PHYSICAL THERAPY PRACTICE LAW

July 14, 1952—052-213.

PHYSICAL THERAPIST—REGISTRATIONS—APPLICATION FEE—REFUND—EXEMPTIONS—NONRESIDENTS— EXAMINATIONS

QUESTION: 1. May rejected applicants for registration legally receive refunds of their \$5.00 application fee?

2. What is the effect of the exemption clause, §486.16, F. S.?

3. What construction should be placed upon §486.05, F.S.?

4. May the committee register, without examination, individuals who are registered in other states, or would Ch. 486 have to be amended.

To: *Miss Mabel Parker, Secretary, Physical Therapy Examiners, Miami, Florida:*

As to question number one, §215.26, F.S., provides:

“(1) The comptroller of the State of Florida *may refund* to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitutes:

“(c) Any payment made into the state treasury in error; and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to

time such sums as may be necessary for such refunds."
(Italics supplied)

Section 486.05 limits those eligible for registration without examination to those applicants who are members of the American Physical Therapist, or the American Registry of Physical Therapist Technician, and no other training, no matter what source, quantity or quality, will qualify the applicant. Therefore, *if the State Board of Medical Examiners determines that the applications and fees were submitted in error* due to the misleading phrase "or have had the following training" used in the application form supplied by the Board, the fees may, in the discretion of the Comptroller, *be refunded* by proper procedure under §215.26.

The word "Board" as used in this opinion means the State Board of Medical Examiners.

As to question number two, §486.16 is interpreted to mean that such persons listed in said section are not required to register as physical therapists, when physical therapy is used or practiced as a part of the treatment, or incidental to the practice of their profession. However, if they intend to hold themselves out as physical therapists and use the designation of "R.P.T." or "Registered Physical Therapists" after their name they are required to register under the provisions of Ch. 486.

As to question number three, §486.05 was construed correctly by the board. To register under §486.05 a person must be (1) qualified as a Physical Therapist by the American Physical Therapist Association and on June 11, 1951, have been a practicing Physical Therapist in the State of Florida, or (2) be qualified as a Physical Therapist by the American Registry of Physical Therapist Technicians, and on June 11, 1951, have been practicing Physical Therapy in the State of Florida.

This interpretation appears to be the only one possible in view of the language used. The question of the legislative intent does not arise whenever a law is clear upon its face, it is only when an ambiguity appears that resort will be had to the legislative intent. See *Fine v. Moran*, 74 Fla. 417, 77 So. 533; *McCamy v. Payne*, 94 Fla. 210, 116 So. 267; *Clark v. Kreidt*, 145 Fla. 1, 199 So. 333; *State v. Swope*, 159 Fla. 18, 30 So. 2d 748.

The misunderstanding undoubtedly arose from the provisions of §486.03 (4) which granted discretion to the board as to what course to approve to entitle a person to take the examination. The action of the board in not approving any additional schools that the Legislature did not approve in no way affects those applicants seeking registration under §486.05.

As to your inquiry relative to the constitutionality of §486.05, I wish to advise that this office does not pass upon the constitutionality of any act of the Legislature as that is a matter for the courts to decide through appropriate judicial proceedings.

Replying to question number four, it is my opinion that the present act sets up two ways for registration: (1) by passing an examination, and (2) without examination by complying with §486.05. Since individuals in other states cannot comply with §486.05, the only method of registration is by examination. Legislative amendment would be necessary to change this.

CHAPTER XXXI

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

MILK COMMISSION

August 1, 1951—051-250.

MILK COMMISSION—MARKETING AREA—SUPERVISION—WITHDRAWAL OF

QUESTION: Is it within the authority of the Florida Milk Commission to withdraw its supervision from a marketing area once it has established the area and supervised same?

To: Honorable L. K. Nicholas, Jr., Administrator, Florida Milk Commission, Jacksonville, Fla.:

Section 501.20, F. S., provides that the milk commission *shall* withdraw the exercise of its powers from any market area established under the provision of Ch. 501, F. S., upon a written application by a majority in number of the producers and producer-distributors; provided that such producers and producer-distributors shall produce not less than fifty-one per cent of the volume of the milk distributed in said market.

I do not find where the Commission may withdraw its supervision from any market area except under the terms of the foregoing statute.

Your question is answered in the affirmative.

FLORIDA HOTEL AND RESTAURANT COMMISSIONER

February 11, 1952—052-36.

FLORIDA HOTEL AND RESTAURANT COMMISSIONER —COMPENSATION

QUESTION: May the governor and the state cabinet, in connection with the employment of a Florida Hotel and Restaurant Commissioner pursuant to §2, Ch. 26945, Laws of 1951, fix the salary of such employee?

To: Honorable C. M. Gay, State Comptroller:

It appears that the Legislature, by Ch. 26945, Laws of 1951, reorganized the State Hotel Commission into the Florida Hotel and Restaurant Commission and authorized the governor and his cabinet to employ a Florida Hotel and Restaurant Commissioner, which commissioner serves "at the pleasure of the governor and the state cabinet." Although the State Hotel Commissioner *was a state official* under Ch. 509, F. S., now repealed by §9 of said Ch. 26945, the present Florida Hotel and Restaurant Commissioner *is an employee* of the governor and his cabinet (§2 of said Ch. 26945). With the repeal of Ch. 509, F. S., there is no statute directly fixing the compensation of the hotel commissioner as previously under §509.02, F. S.

Item 65, §1, Ch. 26859, Laws of 1951, being the general appropriations act of 1951, contains an appropriation to the hotel commission in the sum of \$133,784.00 for salaries, "including salary of \$6,000.00 per annum for State Hotel Commissioner, and an increase of \$25.00 per month for each of the present 31 inspectors." Although this appropriations act became a law on *June 9, 1951*, the appropriation was effective for the biennium beginning July 1, 1951. Section 7 of the said appropriations act provides that "where the salary of any officer or *employee* has not been changed by any act of the legislature of 1951, the appropriation herein for salaries respecting such officer or *employee* shall control the salary or compensation to be paid such officer or *employee*." These observations seem to raise the question of whether or not the Florida Hotel and Restaurant Commissioner is within the above quoted provision found in Item 65 of §1 of Ch. 26859, *supra*.

When the said appropriations act became a law on *June 9, 1951*, Ch. 509, F. S., was in force and unrepealed, and the State Hotel Commissioner was an existing officer of the State; however, with the adoption of Ch. 26945, Laws of 1951, which became a law on *June 11, 1951* (although not effective until July 1, 1951), Ch. 509, F. S., was repealed and the *office* of State Hotel Commissioner was abolished effective July 1, 1951, and the *employment* of a Florida Hotel and Restaurant Commissioner was authorized, also as of July 1, 1951. The State Hotel Commissioner and the Florida Hotel and Restaurant Commissioner are different; the former was a state office and the latter is a state employee. There is a great distinction between the status of a state officer (*State v. Hocker*, 39 Fla. 477, 22 So. 721; *State v. Sheats*, 78 Fla. 583, 83 So. 508; *McSween v. State Livestock Sanitary Board*, 97 Fla. 749, 122 So. 239, text 246-248) and that of a state employee (*State v. Sheats*, 78 Fla. 583, 83 So. 508, text 509; *Palmer v. Acelroad*, 149 Fla. 616, 6 So. 2d 550, text 551-2). The distinction between the office of State Hotel Commissioner and the Florida Hotel and Restaurant Commissioner, who is an employee of the governor and the state cabinet, is so great that it is doubted that the limitation on the salary of the State Hotel Commissioner, contained in Item 65 of §1, Ch. 26859, *supra*, should be applied to the Florida Hotel and Restaurant Commissioner. This brings us to the power of the governor and his cabinet to fix a salary for their employee, the Florida Hotel and Restaurant Commissioner.

The authority of a public body to employ would seem to contemplate the payment of some compensation to the employee, unless the statute granting the authority provides otherwise. It has been the legislative practice for years to make a flat appropriation for salaries to pay employees of state offices, commissions and boards (*State v. Lee*, 145 Fla. 538, 200 So. 701). We feel that the governor and his cabinet have the authority to employ a Florida Hotel and Restaurant Commissioner and fix his salary at such amount as shall, in their opinion, be reasonable.

August 6, 1951—051-259.

STATE HOTEL COMMISSION—LICENSES—MUNICIPAL ZONING ORDINANCE—CONFLICT

QUESTION: May the holder of a license issued by the State

Hotel Commission operate at a location in a municipality which is zoned against such operations?

To: Honorable James T. Landon, State Hotel Commissioner:

He may not operate contrary to a valid zoning ordinance.

HOTELS, RESTAURANTS AND DINING CARS; REGULATIONS

January 11, 1951—051-7.

STATE HOTEL COMMISSION - YMCA — NO JURISDICTION OVER

QUESTION: Are the room facilities of a YMCA subject to the jurisdiction of the State Hotel Commission?

To: Honorable J. T. Landon, State Hotel Commissioner:

I assume that the following, taken from the letter accompanying your request, is a correct statement of facts in regard to use of the room facilities. The letter states that the use of the rooms of the YMCA in question is restricted to local members, members of the YMCA of other cities, and bona fide applicants for membership. The rooms are not available to the general public.

I have heretofore held that where room facilities of an institution are restricted to members, and are not available to the general public, the structure does not come within the definition of a hotel or rooming house as set out in the Statutes governing the State Hotel Commission. See enclosed copy of opinion of January 23, 1950, No. 050-30, construing §511.01, F. S.

It is my opinion that the State Hotel Commission does not have jurisdiction over the institution described above.

March 28, 1952—052-110.

FLORIDA HOTEL AND RESTAURANT COMMISSION— COOPERATIVE LUNCH ROOM—LICENSES

QUESTION: Does the authority of the Florida Hotel and Restaurant Commission extend to and include the serving of foods on the premises of a business where only employees are served and the project is cooperative and not for profit?

To: Honorable James T. Landon, Commissioner, Florida Hotel and Restaurant Commission:

Supporting your inquiry is a further statement to the effect that the employees of the business institution in question operate a cooperative kitchen on the premises for the sole purpose of serving coffee, sandwiches, and light lunches to themselves. It is wholly owned and operated by the employees, of whom there are approximately 100. I also understand that it is at no time open to the public, and that no one other than a cooperating employee is served or permitted to serve himself.

On January 23, 1950, I addressed an opinion to you, 050-30, on a similar question. I there pointed out that a non-profit athletic club serving meals to members only was not under your jurisdic-

tion. I enclose a copy of that opinion. I think the situation in your present case is quite similar. It is not likely that such an organization would at any time serve non-employees or non-members of the group, because of the penalties imposed by Ch. 511, F. S., on those unlawfully operating without a license.

Assuming that the facts and circumstances in this particular case are as set out above, it is my opinion that the group is not under your jurisdiction and is not required to obtain the Florida Hotel and Restaurant Commission license.

June 25, 1951—051-179.

HOTEL COMMISSION—FEDERAL HOUSING ADMINIS- TRATOR—APARTMENT HOUSE PROJECTS— LICENSE FEES

QUESTION: Where the Federal Housing Administrator, insuror of a mortgage on an apartment house project, takes over the mortgage on default, forecloses, and purchases at foreclosure sale in the name and on behalf of the Federal Housing Administrator, is the Federal Agency liable for State Hotel Commission license fees?

To: State Hotel Commission:

In Opinion 049-42, addressed to your agency, I held that a State agency operating a restaurant is not liable for your license fees or permit fees. There was no Florida statute requiring, directly or by implication, payment of the license or fee by the State or any of its agencies. In that opinion, I followed the well established general rule that "public property is presumed to be exempt from the operation of general property tax laws" and that "tax statutes are construed not to embrace property of the Government or its instrumentalities unless the legislative intention to so include such property is plainly and clearly expressed." 51 Am. Jur. 550.

The Federal Housing Administration claims exemption from your license tax by reason of the language of §606, Title VI, of the National Housing Act (12 U. S. C. A. 1741), which reads:

"Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Identical provisions appear in other Federal statutes relating to Federal properties.

The property will be operated by the Federal agency as a proprietary rather than a governmental function, and there is very high authority which justifies the imposition of taxes in such cases; furthermore, it is far from clear that the quoted statute necessarily excludes by implication liability for all except ad valorem taxes. On the other hand, until the Federal statute is more explicit, in voluntarily subjecting the Government to such tax, it is my opinion that the doubt is to be resolved in favor of

the Federal agency, and that the rule applied to State owned and operated projects must extend to those operated by agencies of the Federal Government.

July 9, 1951—051-204.

MOTELS—CHECK-OUT-TIME—VIOLATIONS— ENFORCEMENT STATUTES

QUESTION: 1. Does a person who checks out of a motel after the check-out time, which check-out time is displayed on the wall behind the clerk's desk, and refuses to pay an additional day's rent imposed because of his late check-out, violate §§511.38 and 511.39, F. S.?

2. What law enforcement body should be called to apprehend a person who violates the aforementioned sections?

To: Mr. W. A. Weatherford, Chief Deputy Commissioner, State Hotel Commission:

AS TO QUESTION ONE

The enclosure, accompanying your request for opinion, indicates that the guest went into the office of the motel and said he was checking out; that he was told that he now owed for an additional day's rent because he was checking out after the established time that was displayed on a sign behind the clerk's desk, and that the guest "replied, in effect, 'That wasn't the agreement that was made at the time I checked in last night. Your desk clerk, in fact, didn't even mention it.'"

Whatever the merits of the controversy, I do not believe they establish that the guest obtained lodging with *an intent to defraud the owner of the establishment*, as is required under §511.38, F. S.

It is true that §511.39, F. S., makes certain conduct prima facie evidence of fraudulent intent. However, the only language in §511.39 that might conceivably be applicable is as follows: "by *absconding* without paying or offering to pay for such food, lodging or accommodations, or by *surreptitiously* removing or attempting to remove baggage," and the underscored words do not seem to apply to the guest here being considered.

To abscond, means generally to go away hurriedly and secretly (see cases collected in 1 Words and Phrases, pages 124-126 and Cumulative Pocket Part thereto, pages 38-39); and *surreptitiously* is defined in Webster's New International Dictionary as doing by stealth or fraudulently or in a clandestine manner.

The facts surrounding the guest's departure, as submitted to this office, do not seem to come within the purview of §511.39, so as to make out a prima facie case of fraudulent intent. In this connection it is well to remember that the criminal laws are strictly construed by the courts.

AS TO QUESTION TWO

In this connection it is to be noted that even if the guest had violated §511.38, the offense therein described is only a *misdemeanor*.

or. Therefore, no law enforcement officer could lawfully make an arrest without a warrant since the offense, on your statement of facts, would not have been committed in the arresting officer's presence. See §901.15, F. S., and *Malone v. Howell*, 140 Fla. 693, 192 So. 224.

Hence to apprehend a violator of said Section it would be necessary for the complainant to appear before a committing magistrate (defined in §901.01, F. S.) having jurisdiction over the territory wherein the offense was committed and procure the issuance of an arrest warrant. This procedure is described in §901.02, F. S.

In the alternative, your complainant, who resides in Dade County, could consult with the County Solicitor, who, in his discretion, is empowered to file a direct information against the offender and to secure the issuance of a *capias* for the person's arrest.

The fact that an offender has returned to his native state in the meantime will not necessarily thwart justice as it is clear that a misdemeanor is an extraditable offense.

August 15, 1952—052-254.

HOTEL AND RESTAURANT COMMISSION—COPIES OF PLANS AND SPECIFICATIONS—DESTRUCTION

QUESTION: Would it be lawful for the Commission to destroy the plans and specifications required by the Statute and the rules of the Commission to be supplied to the supervising architect before the construction of any of the buildings under your jurisdiction, two years after they were so filed?

To: Florida Hotel and Restaurant Commission:

Section 511.23, F. S., provides that before erection or remodeling of any building for use as a hotel, rooming house, apartment house or restaurant is begun the registered architects' or engineers' plans, with detailed specifications, shall be approved by the supervising architect of the Hotel Commission, etc. Your rules also prescribe the manner in which the plans and specifications shall be prepared and that they be filed with your supervising architect and his approval obtained before the construction is commenced, etc. The statutes contain no specific requirement as to how long such documents are to be retained.

You explain that the storage of these plans and specifications over a period of many years has become very burdensome and expensive to the supervising architects, and that you know of no useful purpose which would be served by their permanent retention.

I do not think that these plans and specifications are public records which are required to be kept permanently. On the other hand, they should be kept so long as their preservation would serve any useful purpose, duty or obligation of your Commission in regard to the structure. I think this is a matter which should be covered by a rule or regulation of the Commission. I suggest that

you prepare full information as to how long plans and specifications could be of any use or value to the Commission, together with other pertinent data, and request the Commission to adopt an appropriate rule. It is my opinion that any reasonable regulation which the Commission might make in that respect would be valid.

November 7, 1951—051-400.

STATE HOTEL COMMISSION—APARTMENTS—RENTAL COTTAGES—JURISDICTION

QUESTION: Seven three-room cottages were constructed on a single tract of land. The cottages are rented on a monthly basis to Navy personnel and civilian residents of the city. The cottages, constructed in 1943, have been rented by the month to families. Sometimes the families would remain in a cottage year after year; at other times, Navy personnel would remain in the cottages for the duration of their training. The owner does not furnish linens or cooking utensils. The cottages are only furnished with house-keeping furniture. Does this property come under the jurisdiction of the State Hotel Commission for license, fees, and inspection?

To: Honorable James T. Landon, State Hotel Commissioner:

It is my opinion that your agency does not have jurisdiction over this property, as the cottages appear to be separate rental houses and not apartments within the meaning of Ch. 511, F. S. The fact that they are located on one tract of land is of no legal consequence so far as your jurisdiction is concerned.

SMALL LOAN BUSINESS

April 23, 1951—051-92.

COUNTY BOARD PUBLIC INSTRUCTION—EMPLOYEES— ASSIGNMENT OF WAGES

QUESTION: Is a county board of public instruction required to honor an assignment of wages under §516.17 after service, as required therein, has been effected on the board by the licensee small loan company?

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

In my opinion the last paragraph of §516.17, F.S., apply to employees of the state or governmental subdivisions thereof. See 4 Am. Jur., page 264:

"It is generally held that the salary or fees of a public officer, before they are earned, cannot be assigned, either directly or by indirect means such as the execution of a power of attorney to receive and collect them. There is, however, authority to the contrary.

"The protection thus extended by the general rule to those engaged in public duties is based, not upon their private interest, but upon the necessity of securing an efficient public service by insuring that the funds provided for its maintenance shall be received by those who are

to perform the work, at the periods appointed for their payment. The assignment of such funds before they are due is forbidden under public policy as impairing the efficiency of the public service. This limitation upon the assignment of salaries and fees applies to all public officers. Thus, a fireman or patrolman belonging to a municipal fire or police department is within the prohibition, ..."

I think, therefore, that a county board of public instruction is not required to honor an assignment of wages by one of its employees unless ordered to do so by a court of competent jurisdiction.

SALE OF SECURITIES

January 11, 1951—051-6.

CORPORATIONS—STOCK SALES—EXEMPTIONS

QUESTION: In the light of §517.06 (11), F.S., are stock sales by domestic corporations capitalized in excess of ten thousand (\$10,000.00) dollars exempt when the total number of shareholders does not and will not after a stock sale exceed twenty and the issued and outstanding stock will not, either as to par value or sales price, after such stock sale, exceed ten thousand (\$10,000) dollars?

To: *Florida Securities Commission:*

Section 517.06, F. S., provides in part as follows: "Except as hereafter provided, the provisions of this chapter shall not apply to the sale of any security in any of the following transactions: ... (11) The sale of its shares by a corporation organized and existing under the laws of this state *when the total number of shareholders does not and will not, after such sale, exceed twenty and the total face amount or total sales price of such shares does not and will not, after such sale, exceed ten thousand dollars*; provided, that such securities are issued and disposed of without the payment of any commission ..."

There appear to be two types of capital of a corporation organized in this State, (1) the authorized capital stock (the maximum number of shares of stock with nominal or par value ... that the corporation is authorized to have outstanding at any time) and (2) the paid in or outstanding capital (the sum of the aggregate par value of all shares of stock having par value issued by the corporation and the aggregate amount of consideration received by the corporation for the issuance of additional shares without par value ...). Such capital stock might also be referred to as authorized and issued capital stock.

A reading of said §517.06 (11), F. S., indicates that the Legislature had in mind issued and outstanding capital stock and not authorized capital stock. In order for an issue of stock of a corporation to be within the purview of §517.06 (11), F. S., the "*total shareholders must not exceed twenty, and the total face amount or the total sales price of all stock issued must not exceed ten thousand (\$10,000) dollars*" (see 1941-2 Biennial Report 674). If the sales price of the stock is at par or less then it may issue ad-

ditional stock under said §517.06 (11), F. S., when such additional stock will not increase the total par value of stock beyond ten thousand (\$10,000.00) dollars and the total number of shareholders beyond twenty. If the sales price is in excess of par then the sales price is used as the measure of value instead of par value.

In the light of these limitations we are of the opinion that the limitation contained in §517.06 (11), F. S., is measured by the amount of issued and outstanding capital stock and not by the authorized capital stock of a corporation. The above question is, therefore, answered in the affirmative.

February 1, 1951—051-24.

FLORIDA SECURITIES COMMISSION—REGISTRATION OF SECURITIES

QUESTIONS: 1. When an application for registration of a security by notification meets the requirements of the statutes and the rules and regulations of the commission, both on the basis of the continuous operation of the business and the average annual net earnings, may the commission deny the registration of the security for any reason?

2. When an application for registration of a security by notification meets the requirements of §517.08 (2), F. S., must there be some positive action by the commission before the security may be lawfully sold or is the filing of the application sufficient?

3. Do the further proceedings by the commission, mentioned in §517.08 (2) (e), F. S., refer to action taken by the commission "before" or "after" the actual legal registration of the security?

4. Do the "proceedings" provided for in §517.08 (2) (e), F. S., relate to action taken by the commission as to the registration of the security, or to action taken to determine whether the registration should be cancelled or revoked for cause?

To: *Florida Securities Commission:*

Under §517.08 (1), F. S., certain classes of securities may be registered by "notification," the procedure for such "registration by notification" being set out in Section 517.08 (2). Under §517.08 (2), "securities entitled to registration by notification *shall be registered* by the filing, by the issuer or any registered dealer interested in the sale thereof, in the office of the commission, of a statement, with respect to such securities, containing" certain information concerning the said securities. "The filing of such statement, in the office of the commission, and the payment of the fee hereinafter provided, *shall constitute the registration of such security.*" (see §517.08 (2) (d)).

Although the actual language of §517.08, F. S., relating to registration by notification, seems only to contemplate the filing with the commission of the statement required to complete registration of the security in question, subsequent language used in the said section clearly contemplates that the commission check the contents of the statement and "if, at any time in the opinion of the commission, the information contained in the statement

or circular filed is or has become misleading, incorrect, inadequate or incomplete," the commission may require the submission of further information as to the security in question and its qualification for sale in this state. Upon the failure of the person required to furnish further or additional information to furnish the same the commission is authorized to take such action as it may deem necessary even to entering an order suspending the further sale of such security in this State. Although in the case of registration by notification, as well as registration by announcement, the statutes may be construed as only requiring the filing of the statements or notifications therein contemplated, it is also noted that in addition to such filing there is also required the filing of a consent to service of process (§517.10, F. S.) as well as the payment of a filing fee. It is to be doubted that the legislature intended the registration to be complete until after the filing of the consent to service and the payment of the filing fee.

It is provided in §517.09, F. S., that "the commission shall *receive and act upon* applications to have securities registered by qualification," however, we have been unable to find a similar provision in the statutes relating to registration by notification and by announcement. The commissioners who drafted the Uniform Sale of Securities Act, from which Ch. 517, F. S., was derived, stated in their prefatory note that "the principal difficulty has been to facilitate the marketing of sound securities of unquestionable merit without burdensome formalities while at the same time protecting the public against fraud. Attention is called to the feature of registration by notification, as embraced in Section 7 (§517.08, F. S.) as to certain special classes of presumably sound securities, as distinguished from other securities which must qualify under Section 8 (§517.08, F. S.), or which are exempt under Section 4" (§517.06, F. S.). From these observations it appears that the said commissioners contemplated informal action under §517.08 but formal and positive action under §517.09. Under said §517.08, it is probable that the legislature had in mind that the commission would upon receipt of the statement, mentioned in §517.08 (2), examine it for the purpose of ascertaining whether it is in proper form and relates to securities within the purview of said section, and if found to be within said section, that it would be filed by the commission. It is doubted that the statutes contemplate the entry of a formal order as may have been contemplated by §517.09. The statutes seem to contemplate that the commission will examine the statement mentioned in said §517.08 before it is admitted to their files and formally filed. If the commission, upon examination of the statement, either before or after filing, finds that "the information contained in the statement is or has become misleading, incorrect, inadequate or incomplete" they may take action thereon and require a showing that the securities are entitled to registration by qualification.

The purpose of Ch. 517, F. S., is to protect citizens and residents of this State from financial loss from fraud in connection with the sale of securities in this State; although there was no intention to protect such persons from financial loss generally (State v. Minge, 119 Fla. 515, 160 So. 670; State v. Hemphill, 142 Fla. 728, 195 So. 915).

In the light of the above and foregoing statutes, authorities and observation we feel that:

1. The first question should be generally answered in the negative; however, in the light of the purpose of the statute, the commission may refuse to accept an application for filing when the same is incomplete or there are any factual circumstances known to the commission that might make the sale of the securities in this State fraudulent.

2. As to the second question, we do not think that the statutes contemplate any formal action on the part of the commission. The filing of the statement seems to be sufficient as a registration. However, the filing of the application seems to contemplate at least an informal examination of the application to see that it complies with the statute, if it does not it should be refused for filing and returned to the applicant.

3. As to the third question, we feel that the statutes contemplate that the proceedings mentioned in §517.08 (2) (e), F. S., may be taken either before or after formal filing of the application. If there is some defect apparent we see nothing to be gained by admitting the application to the files and then making a formal order cancelling the registration. The application may be rejected for filing and its filing refused.

4. The above observations seem to answer the fourth question also.

February 13, 1952—052-38.

SECURITIES—PROPERTY MORTGAGE—PROMISSORY NOTES—BONUS

QUESTION: Where the owner and operator of a business in this State runs an ad in a newspaper seeking loans of funds promising to secure such loans by a first mortgage on property, and agreeing to pay a bonus in addition to interest for such loans, does such owner and operator violate the provisions of Ch. 517, F. S.?

To: Florida Securities Commission:

The owner and operator of a dolomite mine in this State, on January 2, 1952, and probably on other dates, caused an ad to be run in one of the daily papers of this State, published in a large city in this State, wherein he sought the loan of funds with the promise that such loan would be secured by a first mortgage and that interest and a bonus would be paid for the use of such loans. It is indicated in the said ad that loans theretofore made "paid over 18% for year 1950" and "paid over 21% for 1st 11 months of 1951," and that "interest and bonus paid monthly." It is also stated in the said ad that the "minimum unit of investment \$2,500.00," and that a "substantial investment could lead to active participation in management."

There is attached to your said request for opinion a form of promissory note evidently used together with form of mortgage securing said note. These instruments appear to be in the usual form used in this state. However, there appears also a form of agreement

used providing for the bonus, which agreement appears to be supplemental to the mortgage and note but does not appear to have been made a part thereof. In this supplemental agreement the maker of the note and mortgagor agrees to pay to the person making the loan a bonus of so much per ton "on every ton of Dolomite shipped by party of the first part from mine located" at a certain address in Florida. There is some indication in the file that the bonus for a loan of \$10,000.00 may be *four cents per ton* on every ton of Dolomite shipped from one of the mines of the owner. We judge from the file that the mine owner in question has, by ads in newspapers, sought loans from the public and that there was no intention of obtaining only one loan as an isolated transaction. We have here a general offer to take loans of funds and secure them by mortgage on property and to pay the persons making the said loans a bonus on mining operations in addition to interest on the loans.

The term "security," as used in our statutes regulating sales of securities in this State, includes "any note . . . evidence of indebtedness *certificate of interest or participation* . . . certificate of interest in a profit-sharing agreement, or the right to participate therein, *certificate of interest* in an oil, gas, petroleum, *mineral or mining title or lease, or the right to participate therein*, . . . interests in or under a profit-sharing or participation agreement or scheme, or other instrument commonly known as a security . . ." (§517.02 (1), F. S.). We do not think that the instruments in question are "exempt securities" under §517.05, F.S., and we doubt that they constitute exempt transactions under §517.06, F. S. There does not appear to have been only a single payee and mortgagee so as to bring the transaction under said §517.06 (7) nor does it appear from the record before us that there was any intention to limit the transaction to twenty purchasers not exceeding ten thousand dollars each; however, these appear to be questions of fact that should be determined by examiners for the commission.

Mortgage notes have been held to be securities and within the purview of some state statutes (Annotation 163 A. L. R. 1102). The instrument accompanying the note and mortgage securing it might be said to be a certificate of interest in production (Annotation 163 A. L. R. 1074). From the evidence now before us we are inclined to think that the note, mortgage and supplemental agreement, when read and considered together, constitute a security within the purview and intention of Ch. 517, F. S., unless the facts not shown by the records bring it within some of the exempt transactions mentioned in §517.06, F. S.

March 24, 1952—052-103.

SECURITIES—FRATERNAL BENEFIT SOCIETY—STOCK INSURANCE CO. CONVERSION—REGISTRATION EXEMPTION

QUESTION: Where, under the laws of another state, a fraternal benefit society is being reorganized into a stock insurance company, does the stock of the said insurance company, to be issued to members of the fraternal society residing in this State, in exchange for their rights and interests in the said fraternal

benefit society require registration in this state, or is it entitled to an exemption under §517.06, F. S.?

To: Florida Securities Commission:

An examination of your file in this connection, handed us with the request for opinion, that the stock insurance company is being formed by the conversion of the fraternal benefit society into a stock insurance company. The right to make this conversion and reorganization, being governed by the home state of both the fraternal benefit society and the stock insurance company, is here presumed from the very fact of its conversion and reorganization. The issue of stock by the stock insurance company here being considered is in the total amount of \$100,000.00 of the common stock of the said stock insurance company, which, as we are informed, will be offered to the policy holders of the fraternal benefit society for their rights, interests and obligations thereto and therein. The scheme seems to contemplate the taking over of the property, rights, interests and obligations of the fraternal benefit society by the stock insurance company; in general effect the scheme seems to be the reorganization of the fraternal benefit society into a stock insurance company. Stock in the insurance company is to be exchanged with the members of the fraternal benefit society for their insurance contracts or policies.

It is provided, by §517.06, F. S., that, except as otherwise expressly provided, the provisions of Ch. 517, F. S. (governing the sale of securities in this state) "shall not apply to the sale of any security in any of the following transactions (4) . . . the issuance of securities to security holders or other creditors of a corporation in the process of a bona fide reorganization of such corporation made in good faith and not for the purpose of avoiding the provisions of this chapter, either in exchange for the securities of such security holders of claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors . . . (6) The transfer or exchange by one corporation to another corporation of their own securities in connection with a consolidation or merger of such corporations . . ."

The legal relationship between a member and a mutual benefit association embraces not only the benefit certificate or contract but the correlative rights and obligations between the association, as a corporate entity, and the member as a member of the said entity under the Constitution, laws and charter of the corporation. His membership in the benefit association represents his rights and interests therein as does the stock of a stockholder in a business corporation. (46 C. J. S. 785, §1452). A consolidation of corporations exist when a new corporation springs into existence to assume the liabilities of an existing corporation and the prior corporation is dissolved and ceases to exist. There is a technical difference between a consolidation and a merger. (19 C. J. S. 1364, §1604). If the creation of the stock insurance company and its absorption of the mutual benefit society be considered either as a reorganization, consolidation or a merger (we construe the same to be a consolidation) then it is exempt under §517.06 (4) or (6) F. S., above quoted from. The transaction of the exchange of stock for the benefit certificates and membership is exempt; any attempt of the persons receiving such stock to place the same on the market in this state is

another question not here determined. This seems to answer the above stated question.

September 13, 1951—051-314.

CORPORATIONS—SECURITIES—EXEMPTIONS

QUESTION: 1. Are the twenty-year Sinking Fund Collateral Trust Bonds, Series "C" of the New England Gas and Electric Association, a Massachusetts Trust holding association, exempt securities under §517.05 (4), F.S.?

2. Is a Massachusetts Trust holding association a "holding corporation" within the purview of said §517.05 (4), F.S.?

To: *Securities Commission:*

It appears from a copy of the registration statement filed by the subject association with the Federal Securities and Exchange Commission that the New England Gas and Electric Association is "a Massachusetts trust organized in accordance with the laws of the Commonwealth of Massachusetts, by declaration of trust dated December 31, 1926". In 12 C. J. S. 811, §1, it is stated that "a business or common law trust, commonly known as a 'Massachusetts trust,'" is a form of business organization consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest is divided". The essential attribute of such trust is the placing of property in the hands of trustees, existing apart from the beneficiaries, who manage and deal with it, as principals, for the use and benefit of the beneficiaries.

Such trusts are not "corporations" within the purview of our corporate statutes generally, and would probably be treated as a partnership or joint stock association (*Willey v. W. J. Hoggson Corporation*, 90 Fla. 343, 106 So. 408). This brings us to the construction of the Florida Statutes relating to the sale of securities in this state. Section 517.05 (4), F. S., provides in part that "any security issued or guaranteed, either as to principal, interest or dividend by a corporation owning or operating a railroad or other public service utility" is an exempt security not requiring registration under our statutes relating to the sale of securities in this state. The same statute also exempts "bonds, notes and other evidences of indebtedness issued by a holding corporation and secured by collateral consisting of any securities hereinabove described." It is noted that the statute refers to securities issued or guaranteed by "a corporation" or by "a holding corporation." In both cases the reference is to a corporation. Although the term "person" as used in the sale of securities statutes is defined in §517.01, F. S., we find no definition of the term "corporation" in the sale of securities statutes. Although the word "person" when used in the statute may be extended to include corporations, business trusts, etc., (§§1.01 and 517.01, F.S.) nowhere in the statute do we find any provision extending the term "corporation" to individuals, trusts, associations, etc.

Although under the same statutes trusts, associations, etc., have been held to be within the term "corporation" used in a statute, usually by reason of the context of the statute, (see 9 Words and Phrases 679 et seq) we find nothing in Ch. 517, F.S., indicating that the language used in §517.05 (4), F.S., was intended to embrace anything other than corporations in the technical sense. In §517.08, F.S., reference is made to "securities issued by a corporation, partnership, association, company, syndicate or trust" Section 517.09, F.S., provides for the registration by qualification of securities issued by not only corporations but also associations, trusts, partnerships and individuals. See also §517.10, F.S. In the light of these observations, we do not think that a trust is a corporation within the purview of §517.05 (4), F.S., so that its securities are not within the exemption provision thereof.

The above questions are both answered in the negative.

November 2, 1951—051-393.

SECURITIES—OIL AND GAS MINING LEASES—UNDIVIDED INTERESTS—SALES

QUESTION: Are undivided interests in an oil and gas mining lease, encumbering lands in the State of Oklahoma, within the purview of Ch. 517, F.S., so as to require registration under said statutes as a condition to sale in this State?

To: Florida Securities Commission:

It appears from your file, furnished us with said request for opinion, that the lease in question is an oil and gas mining lease encumbering an eighty acre tract of land in the State of Oklahoma. The present owner of an undivided interest in and to said lease has offered and sold, in this state, undivided interests in and to the said lease; specifically an undivided one-thirty-second interest in an undivided three-fourths of a seven-eighths interest in and to said lease was sold in this State on August 23, 1950.

Looking to the reported cases of the Supreme Court of the State of Oklahoma (see *Cornelius v. Jackson*, Okla., 209 P. 2d. 166; *Myers v. Central National Bank*, 183 Okla. 231, 80 P. 2d. 584; *Cuff v. Koslosky*, 165 Okla. 135, 25 P. 2d. 290; and other cases), it appears that a lessee of oil and mineral mining rights in that state has the right to enter upon the lands described in the lease and explore for oil and gas and to take same when discovered. No right to the oil and gas appears to pass until taken from the earth and reduced to possession. The rights of such lessee have been held to be property (*Cuff v. Koslosky*, supra) in the nature of a chattel real subject to ownership and sale (*Cornelius v. Jackson*, supra) and an interest or right in the land itself in the nature of a separate estate (*Cornelius v. Jackson*). In the *Cornelius v. Jackson* case the court said that under one of its former opinions and the authorities therein cited "we are committed to the rule that a conveyance of the oil and gas and other mineral rights in and under land is a conveyance of an interest in the land itself and creates a separate estate therein."

Under §517.02 (2), F.S., "security" under Ch. 517, F.S., includes any "certificate of interest or participation in an oil, gas, pe-

troleum, mineral or mining title or lease, or the right to participate therein." Our problem is whether or not the above sales and assignments of undivided interests in the oil and gas mining lease in question is a "certificate of interest or participation in oil, gas . . . mining title or lease, or the right to participate therein" within the above definition of a "security." There is an extended annotation upon this question in 163 A. L. R. 1060 to 1075, inclusive, from which it appears that like and similar instruments have been held to be "securities" within the particular statutory definitions. Special attention is directed to the cases of *People v. Jackson*, 24 Cal. App. 2d. 184, 74 P. 2d. 1085; *People v. Daniels*, 25 Cal. App. 2d. 64, 76 P. 2d. 556; *Domestic and F. Petroleum Company v. Long*, 4 Cal. 2d. 547, 51 P. 2d. 73; *Securities and Exchange Commission v. C. M. Joiner Leasing Corporation*, 320 U. S. 344, 64 S. Ct. 120, 88 L. Ed. 88; *Fisher v. Schilder*, CCA 10th, 131 Fed. 2d. 522; *People v. Craven*, 219 Cal. 522, 27 P. 2d. 906; *State v. Ogden*, 154 Minn. 425, 191 N. W. 916.

Although the answer to the above question is not free from doubt, we feel that, until the question is finally determined by the courts of this State, the commission should consider and treat instruments, like and similar to those which are the subject matter of this opinion, as being securities within the purview and operation of Ch. 517, F.S. This seems to answer the above stated question.

December 14, 1951—051-455.

CORPORATIONS—STOCK—PRIOR ORIGINAL MARKETING— REGISTRATION BY ANNOUNCEMENT

QUESTION: Where pre-organization subscriptions are sold to not more than twenty-five subscribers under §517.06 (10), F.S., and the corporation is organized and the stock issued pursuant to such subscriptions, should this be construed as a "prior original marketing by the issuer, or by an underwriter on behalf of an issuer," so as to entitle the corporation to registration by announcement as provided by §517.091, F.S.?

To: Florida Securities Commission:

It is provided in and by §517.06, F.S., that the Blue Sky Laws of this state do not apply to the sale of corporate securities where the sale is for "not exceeding twenty-five subscriptions for shares of the capital stock of a corporation, prior to the incorporation thereof under the laws of this state, when no expense is incurred, or no commission, compensation or remuneration is paid or given for or in connection with the sale or distribution of such securities." Section 517.091, F.S., provides "that securities that have been outstanding and in the hands of the public for not less than one year as the result of *prior original marketing* by the issuer, or by an underwriter on behalf of an issuer, shall be entitled to registration by announcement . . ." This section also requires that, as a condition to registration by announcement, the securities shall have "been outstanding and in the hands of the public for not less than one year."

Section 517.06, F.S., above mentioned was evidently intended to permit the organization of a corporation by not more than twenty-

five persons without requiring the registration of the corporate stock to be subscribed by them. They may be said to be the organizers and incorporators of the corporation. To be within the purview of §517.091, F.S., the securities shall "have been outstanding in the hands of the public for not less than one year." It is doubted that the stock in the hands of subscribers, pursuant to §517.06 (10), F.S., is stock in the hands of the public within the purview and meaning of §517.091, F.S. Upon the question of the meaning of the term "public" see 42 C.J.S. 480; 53 C.J.S. 771; 73 C.J.S. 274 et seq. We, therefore, do not think that stock in the hands of subscribers within the purview of §517.09 (10), F.S., should be considered as stock "in the hands of the public" and within the purview of §517.091, F.S.

It has been said that our statutes regulating the sale of securities in this state were "designed to regulate the sale of securities or stocks in speculative enterprises," and that "aside from the seal of a benevolent state to play the role of guardian . . . there is no basis for the act." (*State v. Atlantic Title Company*, 118 Fla. 402, 158 So. 888). We do not think that the issuance of stock to subscribers, in connection with corporate organization within the purview of §517.06 (10), F.S., should be considered as a "prior original marketing by the issuer."

In the light of the above observations we feel that the above question should be answered in the negative.

SALE OF LIQUID FUELS

July 28, 1952—052-236.

STATE FIRE MARSHAL—LIQUEFIED PETROLEUM GASES—REGULATIONS

QUESTION: Are the regulations promulgated under §526.16, F.S., applicable to installations, bulk and consumer, which were made prior to July 1, 1947?

To: Honorable J. Edwin Larson, State Fire Marshal, C A P I T O L:

This is a question of statutory interpretation and thus to find the legislative intent we must look to the sections of the Statutes themselves. *State ex rel. Yaeger et al. v. Rose*, 93 Fla. 1018, 114 So. 373; *Watson, Attorney General v. Holland, Governor, et al.*, 155 Fla. 342, 20 So. 2d 388.

In examining all the sections of Ch. 526, F.S., dealing with this matter (526.12-526.20), it is clear that this is a safety measure under the police power of the state. The sections provide that the State Fire Marshal is to promulgate safety regulations and enforce them through licensing provisions, bond indemnity, misdemeanor suit, and injunction procedure, which constitutes a clear showing that safety was uppermost as the legislative intent in the passage of this act.

Thus, if installations made prior to July 1, 1947, are dangerous and unsafe, and it appears that many are or the Legislature would not have deemed it necessary to pass an act to regulate such installations if there was no danger to the public, then such installations

are from July 1, 1947, subject to the regulations of the State Fire Marshal, whether installed prior to that date or not.

October 25, 1951—051-384.

MOTOR VEHICLES—OUT-OF-STATE MANUFACTURERS— LICENSES AND BOND

QUESTIONS: "A corporation whose domicile and factory are located outside of the boundary of Florida, proposes to manufacture motor vehicles propelled by a Liquefied Petroleum Gas system. They advised that they will be manufacturing and installing Liquefied Petroleum Gas systems on these vehicles, outside of the State of Florida, and then will transport them into the State for selling by a licensed dealer. In connection with the problem of license and bond, will you kindly consider and answer the following questions:

1. Would such firm be required to obtain a license as a manufacturer of appliances and equipment when the entire manufacturing and assembling process takes place outside of the State of Florida?

2. What type of license would a dealer be required to obtain where his only dealings with LP Gas are the sale and maintenance of motor trucks propelled by an LP Gas system?

3. If this firm is required to obtain a license both as a manufacturer and a dealer, would the posting of one bond in the penal sum of \$25,000 be sufficient?

To: Honorable J. Edwin Larson, State Treasurer:

The answer to your questions lies in the provisions of §§526.12-526.20, F.S. These statutes, comprising Ch. 24302, Laws of 1947, represent a comprehensive regulatory law concerning the handling, storage, delivery and use of liquefied petroleum gas. As to licenses, the law provides, in pertinent part, as follows:

"Section 526.13 *License*—It shall be unlawful for any person to engage, *in this state*, in the business of a dealer in liquefied petroleum gas, in the business of a manufacturer of appliances and equipment for the use of liquefied petroleum gas, or in the business of dealer in appliances for use with liquefied petroleum gas, or in the business of installation . . . without first obtaining from the state fire marshal a license . . . which license shall be granted to any applicant who files with the state fire marshal a good and sufficient bond and/or certificate of insurance as hereinafter specified, and pays for such license the following fees: . . ." (There is then set forth a schedule of applicable license fees.)

Section 526.14 provides, in effect, that no license shall be issued to an applicant to engage in any of the businesses described above "except dealers in appliances only" until such applicant shall have filed with the state fire marshal a bond in the sum of \$25,000.

In response to your first question, reference is made to the underlined portion of §526.13 quoted above, which places the prescribed tax only on such businesses *in this state*. Since, in the case

described by you, the entire manufacturing and assembling process will take place outside the state of Florida, it is my opinion that this statute would not be applicable and that the manufacturers of such equipment and appliances cannot be required to pay the Florida license fee prescribed by the act for a manufacturer. This is substantially in accord with an opinion of my predecessor, No. 047-348, dated October 18, 1947 (See 1947-1948 Biennial Report, page 487). In that opinion it was also pointed out that any attempt to impose this license tax on out-of-state manufacturers would constitute an attempt to impose an unlawful burden upon interstate commerce. Your first question is therefore answered in the negative.

As to your second question, it appears that if the dealer is concerned only with the sale and maintenance of motor trucks propelled by a liquefied petroleum gas system, and is not engaged in the business of dealing in the gas itself, or in the business of installing, as defined in §526.12, F.S., his license would be as prescribed in §526.13 for a "dealer in appliances and equipment for use of liquefied petroleum gas, only," which is \$10.00 per year. Since §526.14 excepts "dealers in appliances only" from filing with the state fire marshal the \$25,000 bond, it appears that the instant situation would be governed by that exception and that no bond would be required. However, if in addition to the business of dealing in appliances, the dealer also installs any such apparatus, appliance, or equipment necessary for storing and/or converting liquefied petroleum gas into flame for power for use by the consumer, then he would be required to pay the additional \$15.00 license fee for "Installation," as set forth in §526.13 and would not be excepted from the requirement of posting the bond. Your second question is answered accordingly.

In view of the answers given to the first and second questions, no reply to the third question is necessary.

DOG RACING AND HORSE RACING

January 11, 1951—051-9.

STATE RACING COMMISSION—COUNTY COMMISSIONER— DUAL EMPLOYMENT

QUESTION: Does the Florida law prohibit the dual employment of a county commissioner by the State Racing Commission as an employee at a dog track?

To: Mr. B. P. Beville, Secretary, State Racing Commission, Miami, Florida:

Article XVI, §15, of the Florida Constitution provides, among other things, that no person shall hold or perform the functions of more than one office under the government of this State at the same time, excepting from provisions thereof certain offices not relative to this discussion.

Article III, §27, Florida Constitution, provides that the legislature shall provide for the election by the people or appointment by the governor of all state and county officers, not otherwise provided for by the Constitution. There is no provision in the Florida Constitution with respect to the appointment and qualification of em-

ployees of the State Racing Commission, and their appointment and qualification, powers and duties depend entirely upon the statutes with respect thereto. It would seem, therefore, that an employee of the State Racing Commission is not an officer within the meaning and intent of said §15, Art. XVI.

At common law one person could not hold two offices which were considered incompatible. This rule was founded upon the plainest principles of public policy and its correctness and propriety are instantly recognized. 42 Am. Jur. 926, §59.

The duties of an employee of the State Racing Commission, unless he were a member of the Commission itself, do not appear to be incompatible with the duties of a county commissioner.

I think, therefore, your question is best answered as follows: There appears to be no constitutional or statutory prohibition against such dual employment. This opinion, however, does not attempt to consider the wisdom of such employment or its effects from the standpoint of public policy.

Subject to these remarks, your question is answered in the negative.

May 13, 1952—052-154.

STATE RACING COMMISSION—CORPORATION STOCKHOLDERS—FINGERPRINT RECORDS—PHOTOGRAPHS

QUESTION: Do the provisions of §550.181, F.S., requiring certain persons to furnish the State Racing Commission copies of their fingerprint records and photographs taken under the supervision and direction of the said commission, include stockholders of a corporation?

To: *Honorable D. C. Jones, Florida State Racing Commissioner, Miami, Florida:*

The section of the law pertaining to this question is §550.181 (2), F.S.

There is no question that this statute makes it mandatory that every person who is a *member* of an association holding a permit, every person who is an *officer* or *director* of a corporation holding a permit, and every employee of the holder of such a racing permit or jai alai fronton permit must furnish the said commission for its files, his fingerprints and photograph taken under the supervision and direction of the commission. On September 21, 1951, in opinion 051-325, this office held, as had been previously done by the Supreme Court in the case of *State ex rel Mason v. Rose* (Fla.) 165 So. 347, that the Florida State Racing Commission has wide discretionary power to make rules to govern the business of racing in this state so as to control strictly an activity which, except for the special privileges granted by the legislature under certain conditions, would be unlawful and contrary to the public welfare.

Our opinion also held that the said commission has the inherent power to establish a uniform rule requiring owners of race tracks and holders of permits to be persons of proper, law-abiding, and high moral character.

That opinion further held that after the adoption of a uniform rule requiring stockholders or other persons having interest in racing corporations to meet a uniform standard, if after a fair hearing it was determined by the commission that said stockholders, officers, or directors of such corporations are not persons of good moral character and do not meet the uniform standard laid down by the rule, the permit of such racing corporation could be canceled or denied by the commission.

Therefore, it is my opinion that it is not mandatory for stockholders of a corporation to furnish the State Racing Commission copies of their fingerprints and photographs under this statute, but under the broad and inherent powers of the State Racing Commission and under the moral obligation of the said commission to operate racing and jai alai frontons to the best interest of the general public, it lies within the discretion of the Florida Racing Commission, when the facts show that said stockholders are taking an unusual interest in and playing an extraordinarily active part in the operation of the business of the corporation, to require said stockholders to comply with §550.181 (2), F.S.

September 21, 1951—051-325.

RACING COMMISSION RULES—RACING CORPORATION— STOCKHOLDERS—PERMIT QUALIFICATIONS— CANCELLATIONS

QUESTION: Does the Florida State Racing Commission have authority to compel a stockholder in a corporation having a racing permit in this state to sell his stock?

To: *Honorable D. C. Jones, Chairman, Florida State Racing Commission:*

Gambling in the form of betting on the results of horse and dog races through parimutuel pools within the enclosures of horse and dog race tracks was legalized by the Florida legislature in 1931. The action of the legislature in taking this step was momentous, for, in so doing, the state of Florida departed from its long-established policy of prohibiting all forms of gambling as being morally wrong and detrimental to the economic, religious and social welfare of the people of Florida. In effect, the legislature declared, by the passage of 1931 laws, that gambling under certain conditions, i. e., subject to taxation and state regulation, was legal and not morally objectionable, whereas those forms of gambling which still continued to exist without legal sanction remained morally unacceptable.

During the course of the stormy debate in the House and Senate which accompanied the adoption of this legislation, there were a number of legislators who objected strenuously to the licensing of gambling in Florida. Chief among the objections raised was the argument that gambling in any form, whether countenanced by law or otherwise, was a morally corrupting influence which could only operate to the ultimate detriment of the people. It was argued that while creating legalized gambling at race tracks was ostensibly to attract wealthy tourists, it would also result in inviting an undesirable element of the population to Florida, and that although the state would receive additional revenue in the form of taxes on wagers made at

the tracks, a far greater amount of money would be bet illegally off the tracks, bringing no return to the state in the form of revenue, and which would, along with the money legally wagered, constitute a serious drain on the economy of Florida and its people. To refute these arguments, the theory was advanced and apparently accepted by the legislature that the race tracks which were to be created would be rigidly regulated institutions existing solely at the pleasure of the state government, and would enjoy only such rights and privileges as might from time to time be extended by the legislature. The Racing Commission was created as a policing or regulatory agency to insure the operation of racing in Florida on a high plane in keeping the avowed lofty principles of racing proponents.

Legalized racing thus came into being in Florida, not as a business enjoying inherent rights and immunities of more orthodox activities, but subject at all times to the will of the state to regulate or abolish it, including the power reserved to the state, operating through the Racing Commission, to exercise wide discretionary authority as to the limited privileges to be extended to individuals and corporations seeking to engage in the business of racing in any capacity.

The various statutes pertaining to the Racing Commission, dog and horse racing, are now identified as Ch. 550, F.S. Among the powers granted the Racing Commission are the following:

"... The powers and duties in this chapter specified, and all other powers necessary and proper to enable it to execute fully and effectually all the purposes of this chapter." (§550.01)

"Make rules and regulations for the control, supervision, and direction of applicants, permittees and licensees, and for the holding, conducting and operating of all race tracks, race meets, or races held in this state, provided such rules and regulations shall be uniform in their application and effect, and the duty of exercising this control and power is made mandatory upon such commission." (§550.02 (4)).

In interpreting these powers of the Commission, our Supreme Court in the case of *State ex rel Mason vs. Rose*, 165 So. 347, stated as follows:

"The power of the Legislature to thus authorize a commission to make rules and regulations for the purpose named in the statute is well settled by the case of *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, and the line of cases following that case. While the action of the commission in the making of rules is subject to judicial review as to whether any particular rule, which is attacked is reasonably appropriate to the accomplishment of the purposes of the act and within the power of the commission to adopt, nevertheless, when acting within the authority expressly or impliedly conferred upon them, a wide discretion must be accorded to the commission in the exercise of such authority. *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394. This is especially true of the state racing

commission. The relators have no vested right to race their dogs for money upon the licensed tracks in this state. They are engaged in a business which would be unlawful had not the Legislature seen fit to legalize it under certain conditions and to supervise its operations by a State Commission."

In essence, then, our Supreme Court has held that the Racing Commission has wide discretionary power to make rules to govern the business of racing in this state, so as to control strictly an activity which, except for the special privileges granted by the legislature under certain conditions, would be unlawful and contrary to the public welfare.

In the above cited case, the rule upheld by the Court was one which required "the owner of any dog desiring to enter the same in any race meeting conducted under license from the Florida State Racing Commission shall submit to such licensee evidence showing qualifications of said dog to enter such racing meeting, together with evidence of its registry with the American Kennel Club." Certainly, if this rule could be considered reasonable and in the interest of the welfare of the people, then a rule adopted by the Commission requiring the owners of the tracks themselves to show that they are qualified, morally, financially or otherwise, to engage in this rigidly controlled business of racing, would not seem unreasonable or outside the scope of the Commission's rule-making powers.

It seems to me that the Racing Commission has not only the authority but the duty to ascertain that those persons seeking to engage in this highly restricted business of racing and legalized gambling are in all respects qualified from the standpoint of protecting the public morals, welfare and general interest, and if the applicants or licensees do not measure up to the standards prescribed by uniform and reasonable rules of the Commission, then such licenses or permits may be denied or revoked. By analogy, practically every profession and many businesses closely affected with a public interest are so regulated by statute as to require applicants for licenses or charters to participate in such businesses or professions to prove good moral character and reputation as prerequisites to engaging in such activities. As stated by our Supreme Court in the case of *McInerney vs. Ervin*, 46 So. 2d. 456, "The state is the primary judge of, and may, by statute or other appropriate means, regulate any enterprise, trade, occupation or profession if necessary to protect the public health, welfare or morals."

The making of regulatory rules such as here being discussed are, in my opinion, a legitimate exercise of the police power of the state. Such power is not static but, as the Supreme Court said in the case of *McInerney vs. Ervin*, cited above, "It is in constant state of evolution in order that it meet the calls for its exercise to secure the peace, welfare, good order, health and morals of the people." Recent developments and investigations in the field of organized crime may well lead the Racing Commission to the view that the owners and operators of race tracks must be carefully scrutinized and screened and their moral fitness determined, since it has appeared from these investigations that gangsters and mob syndicates, either directly or indirectly, have moved into legitimate fields

of endeavor, and particularly into legalized gambling operations. These investigations also show that when such individuals invade lawful businesses, they bring with them gangster techniques of intimidation, corrupt procedures, etc., contrary to the best interests of the people. Particularly in racing, the opportunities for such techniques as the doping of horses, the permitting of bookies on tracks, the alignment with off-track bookmaking gamblers, the engaging in unscrupulous political activities, and similar practices are readily available to a dishonest owner or owners of a track.

Therefore, it is my opinion that the Racing Commission has the inherent power to establish a uniform rule that owners of race tracks be persons of proper, law-abiding, and high moral character. I believe that the making of such a rule which would deny a license or a permit to any track which was owned, directed or controlled by persons who do not meet the financial, moral and other qualifications deemed necessary by the Commission to promote the highest standards of racing would be a reasonable exercise of the powers of the Commission, in keeping with the clear intent of the governing laws to protect the public morals and welfare.

This being so, I do not believe that the Racing Commission is compelled to draw a distinction between the corporation itself, or its officers and directors, and the actual owners who dictate the policies of the corporation, i.e., the stockholders. It is true, generally speaking, that a corporation is considered as a separate legal entity from its stockholders. This legal fiction was created for various purposes, one of them being the protection of investors who wish to invest their funds with a corporation without being personally responsible or liable for the acts of the corporation. However, I do not believe that this legal fiction can be carried to the extreme so that it would permit a corporation to be created, and then operated by puppet directors and officers, under the control of stockholders, who if they were openly in charge of the corporation would be so objectionable as to render them unfit to operate a track in Florida.

It seems to follow then, that the Racing Commission has the authority, to adopt such a rule and pursuant to the authority of such rule and its uniform application to examine into the actual ownership of corporations enjoying a racing permit in Florida and to authorize said associations or corporations to operate a race track only if it affirmatively appears that the permittee is acceptable in accordance with the rules of the Commission issued pursuant to the letter and the spirit of the governing laws. As a matter of fact, the governing statutes require of each applicant a statement setting forth the full name of the person, association or corporation as well as the names of the stockholders and directors of the corporation, seeking to obtain a racing permit. In my opinion, this requirement of the statutes that applicants must disclose the names of their officers, directors and stockholders could only have been included so as to insure that permits would not be issued by the Commission to corporations controlled by persons whose background, activities and associations would indicate that they should not participate in this highly restricted racing business. In actual practice, on at least one occasion in or about the year 1942 or 1943, the Racing Commission forced the stockholders of a race track to dispose of their interests, or else be subject to revocation of their license, when it was shown

that the corporation had not filed a truthful statement with the Commission showing an accurate list of the stockholders of such corporation.

As additional evidence of the legislative intent to exclude objectionable persons from participation in racing in this state, reference may be made to Ch. 26832, Laws of 1951, §550.181.

Although this statute does not go into effect until July 1, 1952, this legislative enactment, in my opinion, has the primary effect of writing into law and making mandatory the restriction which the Racing Commission already has inherent power to impose, if it deems necessary. In other words, this law is a legislative declaration of policy which will be of mandatory effect as of July 1, 1952, and which currently greatly strengthens and supports the present inherent authority of the Racing Commission to exclude objectionable persons from the business of racing, by rule or regulation.

Answering your specific question, then, I would state that while it is doubtful that the Racing Commission could force any particular stockholder in a racing corporation to dispose of his interests, it is my opinion, based on the foregoing discussion of the law, that the State Racing Commission, under the broad rule-making powers vested in it by the legislature in order to safeguard the public morals and welfare, has authority to adopt a uniform rule requiring all persons owning, directing, or controlling race tracks to meet certain standards of financial responsibility, moral character, and reputation to be established by the Commission. In other words, it is my opinion that the Racing Commission would be acting within the scope of its authority to adopt a uniform rule requiring stockholders or other persons having interests in a racing corporation to meet uniform standards set by the Commission and, if after a fair hearing it was determined that stockholders, officers, or directors of such corporation are actually criminals, bookmakers, gangsters, or are in league with such persons, or are not persons of good moral character, or have violated any laws or regulations affecting racing, the permit of any such racing corporation could be cancelled or denied by the Commission.

PLUMBING CONTROL LAW

September 22, 1952—052-277.

PLUMBERS—LICENSES—BONDS—EXPIRATION DATE

QUESTION: What should be made the expiration or anniversary date of bonds furnished pursuant to §553.04, F.S.?

To: Honorable C. M. Gay, State Comptroller:

Your attention is directed to the last sentence of the form for such bonds contained in §553.04, F.S. (§3, Ch. 26904, Laws of 1951) which provide that "the premium anniversary date of this bond shall be on the 1st day of October of each year, the first anniversary being October 1, 1951." Section 553.04 (1) further provides that "any person desiring to engage in or work as a plumbing contractor in the State of Florida shall, before obtaining either a state or county occupational license, or other license, when required, to so engage or work" shall furnish the bond required by said section.

Under §205.03, F.S., which governs state and county occupational licenses generally, "no license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year, except as otherwise provided by law." Occupational licenses for plumbers and plumbing contractors are required under said Ch. 205, F.S., and expire under §205.03 above on October 1, following the date of issuance.

Under these statutes, no occupational license should issue to plumbers and plumbing contractors, in counties where Ch. 553, F.S., are applicable unless and until the applicant furnishes the bond required, which bond should cover the period of time covered by the license. No license should be issued unless and until bond, pursuant to §553.05, F.S., is furnished covering the period of time during which the license is to be in force. Due to the fact that the above quoted portion of the last sentence of form in §553.04 makes reference to the premium anniversary of the bond, we think that a bond may be issued to be renewed annually by the payment of an annual premium; in this case no license should be issued until evidence is furnished showing renewal of the bond during the effective time of the license to be issued or renewed.

We, therefore, answer the above question by stating that the expiration or anniversary date of bonds furnished pursuant to §553.04, F.S., is October first following the issuance of the license, that is the expiration date of the license.

CHAPTER XXXII

LIQUORS AND BEVERAGES

BEVERAGE LAW; ADMINISTRATION

February 11, 1952—052-37.

SCHOOLS—HOSPITAL—CRIPPLED CHILDREN— INSTRUCTION TO

QUESTION: Where instruction in elementary and high school subjects is given, under the direction of and by personnel of, the public school system of a county, to children confined in a crippled childrens' hospital in a county, and upon the premises of the said hospital, is there an established school, upon such hospital premises, within the purview of §561.44 (2), F.S.?

To: *Honorable Lewis M. Schott, Director, State Beverage Department:*

"At present, we have three instructors at the Hospital and we are offering courses for the children there from the first through the twelfth grades.

"This program is reimbursed by the State Department of Education under the provisions of the State Minimum Foundation Program. We do consider this an integral part of the School System.

"Because of the need at Hope Haven Hospital, the program which originally started with one teacher has expanded to the above mentioned three. I might add that the first graduate of Hope Haven was given his diploma at the end of the 1950-51 school term."

Section 561.44, (2), F.S., in so far as here material, provides that "no license under subsections (3) to (8), inclusive, of Section 561.34, F. S., shall be granted to a vendor, in the territory lying without the limits of incorporated cities or towns, whose place of business is within twenty-five hundred feet of *an established church or school* . . ." What is an *established school* within the purview of said statute? Doubtless the said provision was inserted into the statute as a police measure designed to prevent the interference of the liquor traffic in this State with churches and schools; one of its designs was doubtless to protect schools and school children from the effects of the liquor traffic when attending school.

In this State "the public schools shall consist of nursery schools and kindergarten classes; elementary and secondary school grades and special classes; adult, part-time, vocational, and evening schools, courses, or classes authorized by law *to be operated under the control of county boards*." (§227.13, F.S.). "A county school system is a part of the state school system of public education and shall consist of all schools, courses, agencies, and services *under the control of a county board*." (§227.13, F.S.). "A county

school system shall include all public schools, classes, and courses of instruction and all services and activities directly related to education in that county which are under the direction of the county school officers." (§230.02, F.S.). County boards are authorized to "provide for the establishment and maintenance of vocational rehabilitation services for the physically handicapped, consistent with state and federal laws" (§230.23 (6) (i), F.S.). The county school boards appear to have authority to lease property for school purposes as well as to purchase same (§230.23 (4), F.S.). Doubtless the county board is maintaining the classes in the hospital upon some lease or similar arrangement with the hospital authorities. There appears to be a legitimate reason for the county maintaining a school or school facilities at the crippled children's hospital, this because they are not able to go to and from the regularly established public schools in the county. If the children are to be educated it will probably be necessary that they be educated at the hospital and not in the regular public school plants. There, therefore, seems to be a valid reason for the county maintaining educational facilities at the hospital in question.

Educational institutions are granted tax exemption under §1, Art. IX, and §16, Art. XVI, of the State Constitution, which institutions include denominational and private schools. Our compulsory school attendance laws recognize not only school attendance in public schools but also attendance in parochial or denominational schools and private schools. (§232.02, F.S.). "The word 'school' is a generic term, denoting an institution or place for instruction or education, or the collective body of instructors and pupils in any such place or institution. A school is not measured by the walls of a building and two or more schools may exist in the same building." (56 C.J. 167, §1). Schools have been divided into two general classes, private and public (56 C.J. 170, §18). See also definitions of "school" in 38 Words and Phrases 305-310 and supplement.

Although we find but few cases considering the question of what are schools within the purview of beverage statutes regulating the granting of licenses to vendors (Appeal of DiRocco, 167 Pa. Super. 381, 74 Atl. 2d. 502; Smith v. Ballas, 335 Ill. App. 418, 82 N.E. 2d. 181; Re. Townsend, 195 N.Y. 214, 88 N.E. 41, decided in 1909; People v. Murray, 16 Misc. 398; 38 N.Y.S. 609; 39 N.Y.S. 1130, decided in 1896; Re. Lyman, 48 App. Div. 275, 62 N.Y.S. 846, decided in 1900), none of these cases are of very much help here. The Florida court, in Rivkind v. State, 159 Fla. 553, 32 So. 2d. 330, text 331, held that a kindergarten nursery (evidently privately owned and operated) was not a school within the above statute.

In the light of the above facts and circumstances, and the authorities cited and referred to, we feel that the above stated question should be answered in the affirmative.

March 12, 1952—052-80.

COUNTIES AND CITIES—RESTAURANTS—HOTELS— LIQUOR LICENSES

QUESTION: Under Ch. 23746, §2, Laws of 1947, as amended by Ch. 25359, §7, Laws of 1949, are hotels and restaurants that

possessed the qualifications set forth in said Acts on June 13, 1949, counted or not in the quota of liquor licenses allowed each county and city?

To: Honorable Lewis M. Schott, Director, State Beverage Department:

The answer to the question propounded by you will be found from a consideration of §561.20, F. S., commonly referred to as the "Liquor License Limitation Law" and amendments thereto over the years.

The first limitation law was passed in 1947 as Ch. 23746, amending various sections of the beverage law, among which was §561.20.

Said Ch. 23746, gave to hotels which were in the process of construction or hotels which were to be constructed afterwards, having a certain number of guest rooms and to restaurants having a capacity for a certain number of people and having 4,000 square feet of space or more, a special restricted and limited license. This limited and restricted type of license for hotels and restaurants did not apply to a general license which had been issued many years prior to this amendment, even though said general license might have been issued to a hotel having the required capacity to receive a restricted license.

This seems clearer when §561.20 (2), as amended by Ch. 25359, Laws of 1949, is considered. That section provided in part that restricted licenses heretofore issued for hotels and restaurants under Ch. 23746, Acts of 1947, or hereafter issued under the exceptions made in the 1949 law to certain hotels and restaurants *shall not be hereafter moved to a new location, such licenses being valid only on the premises of the hotel or restaurant constituting the basis for their original issuance.* Thus, it seems clear that the legislature intended all licenses issued prior to the effective date of Ch. 23746, Laws of 1947, to be general in character, regardless of to whom the license was issued and that all such licenses should be counted in the quota of licenses limited by the legislative act of one license for each 2,500 residents and that there is no intent on the part of the legislature to visit back the restricted type of license authorized by the 1947 law and make it apply to hotels and restaurants who might have had a general liquor license authorizing unrestricted sales of liquor since 1935 and had renewed same from year to year since that particular time.

Therefore, in the light of the above observations and statutes and in the absence of clear legislative authority, it is my opinion that hotels and restaurants which have been issued a general license to sell and dispense intoxicating liquors prior to the effective dates of the 1947 and 1949 laws giving restricted liquor licenses to hotels and restaurants meeting certain qualifications should be counted in the limitation quota of one license for every 2,500 people, irrespective of the fact that the physical setup of said hotels and restaurants might have met the requirements for restricted liquor licenses on June 13, 1949 (the effective date of Ch. 25359, supra).

March 18, 1952—052-90.

HOTELS—"MOTELS"—RESTRICTED LIQUOR LICENSES
—REQUIREMENTS

QUESTION: Does a building having fifty or more rooms where sleeping accommodations supplied for pay to transient or permanent guests, and where a dining room or cafe is operated, all being under one common roof entitle the owner or lessor thereof to a liquor license under §561.20 (2)?

To: *Honorable Lewis M. Schott, Director, Florida State Beverage Department:*

You state in your letter that on the beach highway between Fort Lauderdale and Miami Beach in Dade County, many structures have been erected within the past two years which, although having more than 50 rooms, including coffee shop or dining room facilities, are called "motels" and that these structures are two or three stories high and all under one common roof, that the physical difference between the structure of "motels" and the structure of the ordinary hotel is that generally the guests or tenants of a "motel" enter a small lobby or office and then must leave the structure and walk to their rooms on exterior hallways or walkways and that the stairs leading to the upper stories are on the outside of the building.

Section 561.20 limits the number of liquor licenses that may be issued in the various wet counties of this state to one license for each 2500 residents or majority fraction thereof, and subsection (2) provides that this limitation of the number of licenses shall not be applicable to hotels of not less than 50 guest rooms or to restaurants accommodating a certain number of people, and having a required square footage of floor space.

Section 510.01, F. S. (derived from an act of 1874), defines a hotel. Chapter 511, F. S., which has to do with sanitary and safety regulations for the operation of hotels (derived from an act of 1915, not changed in later acts), defines a hotel for the purposes of that chapter. Section 513.01, F.S. (derived from 1939 act), defines a tourist camp.

It is my view that structures commonly known and referred to as "motels" come more nearly under the definition of tourist camps, §513.01, *supra*, which is also the later enactment, than under the definition of hotels within the meaning and intentment of the legislative act allowing hotels to secure certain restricted type liquor licenses.

The obvious reason for defining hotels in Chs. 510 and 511 in the broad sense rather than restricted manner is that these chapters deal with licensing, sanitary and safety requirements. The term "hotel" as used in §561.20, wherein they are allowed to obtain certain restricted liquor licenses, is used in the restricted rather than the broad sense. If, however, a structure is labeled "motel" but upon investigation, it is found to be in fact a hotel, as to structure, nature, use, etc., the mere fact that it may be labeled and called a "motel" would not prevent it from securing a restricted liquor license as a hotel. Great care must be exercised by the

Beverage Director in determining that any structure comes within the definition of hotel as used in the beverage law prior to approving and issuing a liquor license therefor.

April 30, 1951—051-97.

SOCIAL OR FRATERNAL CLUB MEMBERS—TRANSFER OF WHISKEY FROM WET TO DRY COUNTY

QUESTIONS: "FIRST: Are the laws of Polk County violated by any social and/or fraternal clubs having their clubhouse buildings located in Polk County where members voluntarily contribute stated sums of money for the express purpose of purchasing whiskey and the payment of wages or salary for an employee of the club who, in turn, receives the money so contributed, purchases whiskey in a county where same may be legally sold, transports said whiskey back upon said club house premises and thereafter serves same to the contributing club members without further charges and as ordered by each member so contributing, it being necessary that in order to contribute money for the purposes aforesaid that contributing members also hold membership in said social or fraternal club?

"SECOND: May individual members of a social or fraternal club rent locker space within clubhouse premises located in Polk County and make purchases of whiskey in a legally wet county, bring said whiskey to their said individual lockers and store same therein for the purpose of being served by a club attendant or steward from their own individual lockers or bottles with a charge being made only for ice, glasses, soda and the usual set ups by said attendant without violation of the dry laws of Polk County?"

To: *Honorable Walter W. Woolfolk, State Attorney, Lake Wales, Florida:*

It is true that the Supreme Court of Florida in the case of *Ex Parte Francis*, 76 Fla. 304, 79 So. 753, held that intoxicating liquor is property that is the subject of private ownership, and could be brought into or received in dry territories or counties for one's own personal use and not for resale or for any other lawfully interdictory purpose.

However, the matter relating to the two questions which you propose was most fully discussed by the Supreme Court in the case of *State vs. Livingston*, 159 Fla., 63, 30 So. (2d) 40, in which an Elk's Club in a dry county attempted to mandamus the county judge to place his signature upon a beverage license for the said club. This decision had to do with the Supreme Court of Florida construing the effect of a statute authorizing a club to serve liquor to its members and non-resident guests and declaring same not to be a sale, in the light of the Constitution which prohibits the sale (and this without any qualifications whatsoever) of liquor in a dry county. The court held that portion of the statute allowing clubs in dry counties to serve and distribute liquor to its members to be ineffective. The court also in its holding cited a long list of cases in which it pointed out that many of the authorities cited dealt with the question of a club serving liquor to its members without purchasing a license therefor. Said the court in this case:

"Webster defines 'sale' as 'a contract whereby the

absolute of general ownership of property is transferred from one person to another for a price or sum of money, or, loosely, for any consideration.'

"While this Court has never ruled on the specific point, the overwhelming weight of authority upholds the view that regardless of how the statute may describe the transaction, the serving of liquor by a bona fide social club is a 'sale' within the meaning and definition of the Constitution, and the manner of serving, paying for or other ways to cloak its true meaning cannot in anywise change or alter the transaction."

This holding on the part of the Supreme Court in the light of the facts given in the two questions submitted seems to answer the first question in the affirmative and the second question in the negative.

June 7, 1951—051-151.

COUNTY COMMISSIONERS—ZONING AUTHORITY— SALES OF WINE AND BEER

QUESTIONS: 1. Do the provisions of §561.44 (2), F. S., including the 1949 amendment, give the County Commissioners the authority to zone an area in territory lying without the limits of incorporated cities or towns whereby the sale of wine and beer for consumption on the premises would be prohibited?

2. Under this Section, can an area in the territory lying without the limits of incorporated cities or towns be zoned against beer and wine sales for consumption on the premises without zoning the same area in regard to grocery stores, packing houses and filling stations?

To: Honorable Archie Clement, Attorney at Law, Tarpon Springs, Florida:

Section 561.44, F. S., provides in part that the Board of County Commissioners of any county of the state of Florida may by resolution establish zones and areas in the territory lying without the limits of incorporated cities or towns wherein the location of a vendor's place of business licensed under the beverage act may be permitted to be operated provided that this power shall not apply to vendors licensed under §561.34, (1) (b), F. S., that is to say, vendors who handle beer only by the package and do not allow its consumption on their premises; and the statute further provides that in cases where such zoning is done by resolution of the Board of County Commissioners except in the above case, no license shall be issued for a licensee to conduct a place of business in such location; and further provides that where places lie without the limits of incorporated cities or towns and vendors desire to obtain a license to sell alcoholic beverages regardless of their alcoholic content, which encompasses hard liquor, shall not be allowed to establish their places of business within 2500 feet of an established church or school, which distance shall be measured by the shortest route of ordinary pedestrian travel along the public thoroughfare, except in instances coming within the terms of §561.441, which is the section dealing with the powers of Boards

of County Commissioners in counties that have established zoning and planning boards and in those counties the Commission is permitted to determine distances from churches and schools within which intoxicating liquor may be sold in areas lying without the limits of incorporated cities and towns, such distances to be not less than those established by city ordinance in the county seat of the county involved and not more than the distance established by general law which is 2500 feet.

While the question does not seem to have arisen as to the authority of the state to grant the power to zone regarding alcoholic beverages to Boards of County Commissioners, it has arisen as to granting similar authority to municipalities and in the case of *State, ex rel, Dixie Inn v. City of Miami*, 156 Fla., 784, 24 So. 2d., 705, our court held that the state, in the exercise of its police power, may make a valid law forbidding the sale of intoxicating liquors in a particular locality and may confer on municipalities similar powers. Therefore, under the authority of this case, it is my opinion that the state can likewise confer similar powers on the Boards of County Commissioners of the various counties and your first question is answered in the affirmative.

It is not quite clear to me exactly what is meant by your second question but I am assuming that the proper meaning of same is whether or not an area located in the territory lying without the limits of incorporated cities or towns could be zoned against the sale of beer and wine for consumption on the premises without the necessity of zoning the same area in regard to the general business of operating a grocery store, packing house, filling station, etc., which businesses are not engaged in and are not interested in selling alcoholic beverages for consumption on their premises.

The authority given to cities and counties under the provisions of §561.44, relates only to the regulation and control of alcoholic beverages and has no application to other businesses. Our court said in *State v. Fuller*, 183 So., 726:

"The power to regulate the sale of liquors is clearly with the Legislature. When a person engages in the sale of liquor, he does so with a full knowledge of the right and power of the Legislature not only to regulate but to prohibit. He cannot assert that because of an established liquor business he has a vested right over which the Legislature is powerless to enact laws regulating or prohibiting the same."

The case of *Somlyo v. Schott*, 45 So. 2d., 502, dealt with an attempt by mandamus to force the stepping up of a beverage license from a package liquor license to a consumption on the premise license at the same location, which location fell within a zone established by resolution of the Board of County Commissioners in which resolution existing vendors' places of business duly licensed on the date of the resolution had been excepted from the provisions thereof.

In construing the resolution and the statute authorizing it, §561.44, F. S., the court held that the resolution complained of had not been so clearly shown to be arbitrary, unwarranted, unreason-

able and invalid as to authorize a peremptory writ of mandamus changing the license as aforesaid.

If the grocery stores, packing houses, filling stations, etc., mentioned in your question 2 are not engaged in the sale of alcoholic beverages other than beer in sealed containers not for consumption on the premises, it is my opinion that your second question is properly answered in the affirmative.

July 3, 1951—051-193.

MUNICIPALITIES—ALCOHOL BEVERAGES LICENSES— TRANSFER FEE

QUESTION: Does the town of Lauderdale-by-the-Sea, Florida, have authority to levy, by ordinance, a fee on transfers of alcoholic beverage licenses, either from person to person or location to location, within said town?

To: Honorable R. A. Thrush, Vice-Mayor, Lauderdale-by-the-Sea, Ft. Lauderdale, Florida:

The case of *City of Miami vs. Kichinko*, 22 So. 2d 627, decided in 1945, determined that Ch. 561, F. S., governing the administration of the Florida Beverage Law, is a taxing as well as a regulatory statute intended to have uniform operation throughout the state. In that case the court held that the Legislature, in enacting the State Beverage Law, intended to inhibit all powers of municipalities over the subject of intoxicating liquors, except those powers specifically enumerated in the act.

The only taxing authority granted to municipalities under this law is contained in §561.36 wherein the Legislature authorized incorporated cities and towns to levy and collect certain license taxes not to exceed 50 per cent of the state and county license fees provided for in the law. This section specifically provides that "no tax on the manufacture, distribution, transportation, importation or sale of such beverages shall be imposed by way of license, excise or otherwise, by any municipality, anything in any municipal charter, special or general law, to the contrary notwithstanding, except as herein expressly authorized." The procedure for the transfer of a beverage license from person to person or from location to location is set forth in §§561.32 and 561.33, F. S. I find nothing in either of these provisions authorizing the levy of a transfer tax either by a town or by the state or county. Section 561.33 specifically states that upon the application and approval of a transfer from location to location, "there shall be issued to such licensee a license for the new location without the payment of any further fee or tax."

Since the transfer of a liquor license from one person to another or from one location to another is governed by the above cited sections, neither of which contains any provision authorizing the levy of a transfer fee, and in view of the decision of our Supreme Court that municipalities have only such powers over the subject of intoxicating liquors as are specifically enumerated in the statutes, it is my opinion that the town of Lauderdale-by-the-Sea has no authority to levy a fee on the transfer of such licenses. Therefore, your question is answered in the negative.

July 24, 1952—052-231.

MUNICIPALITIES—FEES—BEVERAGE LICENSE TRANSFER

QUESTION: May a city lawfully require a transfer fee in a sum equal to 12½ per cent of the annual license fee on transfer of a Vendor Alcoholic Beverage License from one individual to another within the city, the provisions of §§561.32, 561.34 and 561.36, F. S., notwithstanding?

To: *Honorable Claude S. Jones, City Attorney, City of Belle Glade, Belle Glade, Florida:*

Section 561.32, F. S., relates to the transfer of licenses and provides that when a bona fide sale of the business has been made, the license may be transferred to the purchaser if he is a person of good moral character, etc.

Section 561.34, F. S., provides for the annual state license tax for the various types of beverage licenses, including vendors, operators of railroad sleeping cars, caterers at race tracks and club licenses.

Section 561.36, F. S., provides in part as follows:

"561.36 *City license tax.* Each incorporated city or town in the state may levy and collect a license tax on each manufacturer, distributor, vendor, caterer and club having a place of business or club house or club rooms within the corporate limits of such city or town not to exceed fifty per cent of the state and county license tax herein provided, but if such city or town provides and collects such license tax the manufacturer, distributor, vendor or club paying such license tax shall be entitled to a reduction in his state and county license tax of the amount so paid for such city or town license tax, upon exhibiting to the county tax collector a receipt for the payment of such city or town license tax. Such city or town licensee who shall have paid their state and county license tax before the ordinance providing for such city or town license tax shall have become effective.

"No tax on the manufacture, distribution, transportation, importation or sale of such beverages shall be imposed by way of license, excise or otherwise, by any municipality, any thing in any municipal charter, special or general law to the contrary notwithstanding, except as herein expressly authorized."

In the case of *City of Miami vs. Kichinko*, 156 Fla. 128, 22 So. 2d. 627, our Court said:

"(1) Pursuant to the Constitutional power, the legislature enacted into law, in 1935, what is known as the State Beverage Act. This Act (chapters 561 and 562, F. S. A.) is a taxing as well as a regulatory statute intended to have uniform operation throughout the State. *Sproul, Tax Collector, v. State ex rel. Smith*, Fla., 16 So. 2d 109.

"This act is designed to cover the field of both regulation and taxation. Langston v. Lundsford, 122 Fla. 813, 165 So. 898.

"In 1939 the City Commission of Miami adopted ordinance number 2161, section three (3) of which purports to limit the number of liquor licenses according to population.

"(2) 'It is elementary that municipalities have or can possess only such power as is conferred by expressed or implied provisions of law. *Malone v. City of Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916D, 208.

"The State Beverage Act gives to municipalities the power to create zones wherein intoxicating liquor may not be sold. The Act also provides as follows:

"Nothing in the beverage law contained shall be construed to affect or impair the power or right of any incorporated town or city of the state hereafter to enact ordinances regulating the hours of business and location of places of business, and prescribing sanitary regulations therefor, of any licensee under the beverage law within the corporate limits of such city or town." (\$562.45, F.S.A.)

"These are all the powers given to municipalities by the State Beverage Act. The most meticulous examination of the Act fails to disclose that it gives a municipality any power, expressed or implied, over the subject of intoxicating liquor, other than above enumerated.

"(3) 'Applying the familiar maxim of the law: *Expressio Unius Est Exclusio Alterius*, and taking into consideration the working of the State Beverage Law that "nothing in the Beverage Law contained shall be construed to affect or impair the power or right of any incorporated town or city to regulate the hours of business, the location and sanitary regulations "of any licensee under the Beverage Law", it was clearly the intent of the legislature to inhibit all powers of municipalities over the subject of intoxicating liquors, except as to those powers specifically enumerated . . .'" (Emphasis supplied)

In the light of the above statute and the holding of the Court in the *Kichinko* case, it is my opinion that the City of Belle Glade does not have the authority to impose a fee or tax for the transfer of a beverage license from one vendor to another, therefore, your question is answered in the negative.

September 19, 1952—052-276.

MUNICIPAL POWERS—SALE OF BEER—ZONING ORDINANCE

QUESTIONS: 1. Does a municipality have the power under the law to zone the sale of beer within the corporate limits for (a)

consumption on the premises, and (b) sale on the premises but not for consumption?

2. Will a municipal zoning ordinance which prohibits sale of beer for consumption on the premises, within a designated distance from a school or church, be applicable to (a) beer parlors or taverns which were in operation prior to the passage of said zoning ordinance, and (b) beer parlors or taverns which were in operation prior to the designation of school property as such, even though no school buildings had been erected on such property?

3. Does a municipality have the authority to call a special election of its qualified voters on the question of whether or not the people desire the city officials to zone certain areas? If so, what election laws would apply?

To: Honorable Frank C. Stanley, Jr., City Attorney, Auburndale, Florida:

Section 561.44 (1), F. S., gives incorporated cities and towns authority to zone as to the location of all types of vendors except those which handle beer by the package only and not for consumption on the premises, that is to say, where beer is sold in a like manner as other bottled or canned commodities, but not for consumption on the licensed premises. These zoning ordinances, however, must be so worded as to be prohibition rather than regulation. See *Downsborough v. Town of Lake Maitland*, (Fla.) 57 So. 2d. 21.

Section 562.14, F. S., gives authority to incorporated cities and towns to independently regulate the hours of sale of alcoholic beverages by city ordinances within the corporate limits of the said city or town, notwithstanding the general state law. Therefore, while a city is not specifically empowered to zone the location of a place of business which handles beer by the package only and not for consumption on the premises, it is authorized to control the hours of sale at said place of business and generally reasonable ordinances along these lines have been upheld. See *State ex rel Dixie Inn, Inc., v. City of Miami, et al.*, 156 Fla. 784, 24 So. 2d 705, 163 A.L.R. 577. *Glackman v. City of Miami*, 51 So. 2d. 294. As to the specific powers that a municipality may exercise over the subject of intoxicating liquors and alcoholic beverages, see *City of Miami v. Kichinko*, 156 Fla. 128, 22 So. 2d. 627.

It was held in the case of *State ex rel First Presbyterian Church of Miami v. Fuller*, 136 Fla. 788, 187 So. 148, that an ordinance of the City of Miami prohibiting licensees to sell liquor within 300 feet of a church or school with a provision therein protecting vendors who were established within the prohibited area when the ordinance was passed, was invalid as being arbitrary and discriminatory. Said the court in that case:

"The purpose of the enactment of the City of Miami was, of course, to make the church and school free from the influence of establishments selling intoxicating liquor. There is no just reason to exempt from its operation such a place of business simply because it was privileged or licensed when the ordinance passed."

Therefore, beer parlors or taverns which were in operation prior to the passage of the zoning ordinances would be affected.

Section 561.45, F. S., provides in part that whenever a licensee has procured a license permitting the sale of beverages containing more than 1 per cent of alcohol by weight, and thereafter a church or school be established within a distance otherwise prohibited by law of the place of business of the licensee, the establishment of such church or school shall not be cause for the revocation of the license of such licensee and shall not prevent the subsequent renewal of such license of such licensee.

This section contemplates the establishment of a school or church within an area prohibited by the general law, a city ordinance or county resolution *after* a licensee had been in business and after the ordinance is in effect and if that be the case, the ordinance would be inoperative as to that particular licensee.

There is nothing in the law to provide for a city election to determine the question of whether or not the people desire their city officials to zone certain areas as to the location of beverage vending places. Such power is specifically provided for by general law and is vested in the administrative powers of the city councils or city commissions of the various cities and towns.

LOCAL OPTION ELECTIONS

May 30, 1952—052-169.

SUPERVISORS OF REGISTRATION—LOCAL OPTION ELECTION—BALLOT BOXES—USE

QUESTION: For what period of time subsequent to the conclusion of the 1952 primary election in Gadsden County, Florida, must the ballot boxes, and their contents, be retained and held by the supervisor of registration of said county undisturbed and sealed?

To: Honorable William D. Lines, County Attorney, Gadsden County, Quincy, Florida:

The relevancy of this question derives from the following circumstances: On April 7, 1952, a petition for local option election, as contemplated by Ch. 567, F.S., was filed with the board of county commissioners of said county. In view of the time of the filing of the petition in relation to the 1952 primary election, the board is required to provide for the holding of such local option election "within sixty days after such . . . primary" (Art. XIX, §1, Florida Constitution; §567.04, F.S.). Unless sufficient of the ballot boxes used in the first (May 6, 1952) and the second (May 27, 1952) primary elections in said county are available for the purposes of the mentioned local option election, the county must incur considerable expense in providing additional boxes.

Prior to adoption of the "Election Code of 1951," a provision of our primary election laws required that ballot boxes, with their contents, used in primary elections should be carefully preserved by the supervisor until after the next succeeding general election. (Former §102.44, F.S.). That provision was not carried forward into the "Election Code of 1951".

On January 6, 1950, which was prior to the adoption of the "Election Code of 1951", in opinion 050-7, directed to the Supervisor of Registration of Bay County, Florida, we dealt with the question of the length of time *subsequent* to the general election boxes used therein should be retained by the supervisor undisturbed and sealed. In that opinion we pointed out that there was no provision of law pertaining to the boxes used at the general election similar to the mentioned provision in former §102.44, relating to primary elections. We stated in effect in such opinion that such boxes should not be disturbed during the period of time an election contest might be instituted under the provisions of former Ch. 104, F.S., and during the time such a suit might be pending. The conclusions reached in such former opinion in principle determine the answer to the instant question.

Former Ch. 104, F.S., set forth a comprehensive statutory procedure for contesting elections. That chapter was repealed by the "Election Code of 1951", and only the mentioned revised portions thereof were included in the latter legislation. Summarized, these are as follows: certification of election or nomination of a person to office may be contested in the circuit court by sworn bill filed within ten days after canvass of returns (§99.192, F.S.); venue for such a proceeding is fixed (§99.202, F.S.); there are provisions concerning decree of ouster and revocation of commission (§99.211, F.S.); the statutory procedure mentioned does not abridge remedy by quo warranto, "but in such case the proceeding in chancery is taken to be an alternative or cumulative remedy" (§99.221, F.S.); and there is a provision concerning appeal (§99.231, F.S.).

It may be that in pursuance of the legal principle *inclusio unius est exclusio alterius*, contesting the regularity of a primary nomination is confined to the procedures specifically described in §§99.192-99.231, both inclusive. However, until a court shall hold otherwise, we are not inclined to assume that other remedies are excluded. If other remedies are not excluded (e.g., judicially required recount by mandamus) they would not be subject to the ten-day limit set forth in §99.192. A contest involving a recount may be had only if the boxes and contents involved are so held that the integrity of the ballots is preserved (see *State vs. Haskell*, (Fla.) 72 So. 651; *Farmer vs. Carson*, (Fla.) 148 So. 557; *State vs. Latham*, (Fla.) 170 So. 469). Nevertheless, in the absence of a suit or action involving a box and its ballots, the box may be opened at any time after ten days from the canvass of the election in which the ballots were voted.

Subject to the proviso below, it is stated that ballot boxes used in Gadsden County, Florida, in the first and second primary elections may be opened, and their contents removed, at any time after the period of ten days has elapsed subsequent to the canvass of the returns of the election in which such boxes were used. Provided, that if at the time it is proposed to open such boxes, a suit or action of any nature contesting a nomination in said primary is pending (whether instituted within the ten day period or not) and the preservation of the integrity of the ballots cast in that particular race is essential to that proceeding, no ballot box containing any such ballots should be opened except in pursuance of court order entered in such proceeding.

CHAPTER XXXIII

AGRICULTURE, HORTICULTURE AND ANIMAL INDUSTRY

SOIL CONSERVATION

August 7, 1952—052-242.

SOIL CONSERVATION BOARD—ELECTION OF SUPERVISORS —WRITE-IN VOTES

QUESTION: In the election of District supervisors are write-in votes valid?

To: Board of Control, Florida State University:

Section 582.18, F.S., sets up a simple and comparatively informal method of electing district supervisors. Briefly, the procedure is as follows:

The State Conservation Board fixes the time for nominating petitions to be filed. Nominees for the office are selected by petition of twenty-five qualified electors of the district. Electors may sign more than one petition. The Board gives notice of the time and place of the election. The names of persons nominated by such petitions within the time allotted are printed on the ballot, etc. The candidates who receive the largest number of votes cast in the election are the elected supervisors of the district. The State Soil Conservation Board pays the expenses of the election, and supervises the conduct thereof. The Board is authorized to prescribe regulations governing the conduct of the elections and the determination of eligibility of voters; and after the election it publishes the results thereof.

The regulations of your Board provide that the supervisors shall be responsible for seeing that suitable persons are nominated to fill vacancies on the board, and point out that more than one nominee for each vacancy is desirable. They also impose upon the Board of Supervisors the duty of securing nominating petitions with the required twenty-five signatures.

In the case you have under consideration, the terms of three of the supervisors of a district were about to expire. Another county had just been added to the district. Petitions complying with the statute and nominating qualified electors for the office were filed but none of the nominees in the petitions were from the new county. At the election, the qualified electors of the new county wrote in, in the customary manner of write-in voting, the name of a qualified elector of the new county. The write-in nominee received the third largest number of votes and, therefore, if the write-in votes are valid he is one of the duly elected supervisors.

The Legislature has much latitude in regulating the many details of all elections but as our court has said, an elector cannot be restricted to the candidates whose names have been printed on

the official ballot. "He must be left free to vote for whom he pleases." *State v. Dillon*, 14 So. 383.

The statutory provision and your Board's regulations relating to nominating by petition of twenty-five qualified electors should be observed but, after all, it was designed only as a simple, easy method of placing in nomination a qualified elector who has the approval of twenty-five electors. In this case there were three vacancies to be filled in the election. I think that write-in votes sufficient in number to be third highest from the whole district must be accepted as a sufficient substitute for the more formal nomination by petition and that while it did not conform to the method of nomination set up in the statute, the qualified electors had the right to select a supervisor in that manner.

Upon the facts stated in the letter accompanying your request for advice, it is my opinion that the name of the elector written in and who received the third largest number of votes was duly elected supervisor and your Board may lawfully so determine.

FLORIDA BOARD OF FORESTRY

March 6, 1952—052-71.

U. S. LANDS—GAS AND OIL—LESSEE—OPTIONEES—RIGHTS

QUESTIONS: Is the Florida Board of Forestry vested with any authority or power under State or Federal Statutes of supervision or direction of operations by optionees or lessees, conducted for operational or explorational purposes, under option or lease from the United States by its authorized agency, granted for the purpose of mining and operation for the production of minerals, oil, gas or other products, within the area defined by the cooperative and license agreement between the United States and the State of Florida under which the Florida Board of Forestry administers lands of the United States for development of a state forest, designated as Blackwater River State Forest?

What rights and privileges does an optionee or lessee enjoy under the provisions of an option or lease granted by the United States for the purpose of exploration or operation of the lands of the United States for mining and operating for oil, gas or other mineral products?

To: C. H. Coulter, State Forester, Florida Board of Forestry:

The answer to the first question is in the negative.

The operation and exploitation of United States lands for the purpose of mining and the production of gas and oil by lessees or optionees of the United States is governed by Title 30, §181 to 194, inclusive, United States Code. The Cooperative and License Agreement between the United States of America and the State of Florida, executed on the 16th day of November, 1938, expressly reserves unto the United States all of the rights to oil, gas, coal and other minerals or mineral ores whatsoever upon, in or under the said property. The pertinent statutes provide for the grant by the United States of options or leases for the operation and exploitation of United States lands for the production of oil, gas and

other minerals. Under the statutes referred to, the options or leases granted vest the optionees or lessees with exclusive power to operate and explore the lands for the development and production of mineral products. It has been judicially decided by the courts of the United States that the right to operate and to explore the lands carries with it the right to enter upon the lands at such times and such locations as may be determined necessary by the lessees or optionees for the purpose of making geo-physical explorations and seismographic tests.

In the light of the reservation in the contract between the United States and the State of Florida, the Forestry Board, as lessee of the lands in question, is not granted or vested with any authority to regulate, interfere with, or supervise the manner in which accredited optionees and licensees may exercise the privileges granted to them under options or leases granted by the United States. The options and leases granted by the United States contain provisions for the protection of the United States and of the lands from injury or damage resulting from the improper or unauthorized operation by the lessees, including that which may be anticipated as a result of fire and the destruction of the growth upon the lands incident to such operations. The Florida Board of Forestry, as lessee, may not under the terms of the license agreement and under the provisions of the law offer any interference or resistance to the use of the lands by the lessees in such manner as may be authorized by the oil or gas leases. All questions arising by reason of the exercise of the privileges granted by the options or leases are referred for determination solely between the United States and its lessees.

The rights and privileges accorded to optionees or lessees of the United States under options or leases for the operation and exploration of lands for oil, gas, and other mineral products are comprehended within the terms of option or lease, as the case may be, and have been judicially determined to include the unobstructed right of access to the lands for the purpose of making any test which may be considered necessary to determine the location or existence of oil, gas or other mineral products below the surface of the ground.

The optionee or lessee under such instruments is authorized to use any approved methods for the accomplishment of this purpose, which includes the use of seismographic methods for the making of geophysical or other tests, and such machinery as may be generally used and employed for that purpose.

The Federal Statutes provide for the payment to the State of Florida as consideration for the use of the lands located within its borders for the subject purposes a sum equal to 37½ % of all moneys received by the United States from sales, bonuses and rentals of the public lands, these funds to be used by the state for the construction and maintenance of public roads or for the support of public schools or other public educational institutions as the Legislature of the state may direct.

The Forestry Board may exact no fees, compensation or charges of any nature for the exercise by the optionees or lessees of the privileges granted.

BOARD OF PARKS AND HISTORIC MEMORIALS

December 4, 1951—051-439.

PARK LANDS—GRAZING LEASES

QUESTION: May the Board of Parks and Historic Memorials of this State grant grazing leases or permits, encumbering its park lands, to persons, firms or corporations?

To: *Board of Parks and Historic Memorials:*

The Board of Parks and Historic Memorials of this State was created by Ch. 25353, Laws of 1949, and was the successor to the Florida Park Service of the Florida Board of Forestry and Parks (see Ch. 592, F.S.). The said Board of Parks and Historic Memorials "is vested with all rights, powers, duties, privileges and authority, relating to park matters, heretofore vested in and exercised by the Florida Board of Forestry and Parks." And all park properties of the said Board of Forestry and Parks were transferred to and vested in the said Board of Parks and Historic Memorials. (§592.08, F.S.). The said Board of Parks and Historic Memorials is authorized to "acquire, in the name of the State, any property, real or personal, by purchase, grant, devise, condemnation, donation or otherwise, in which, in its judgment may be necessary or proper toward the administration of the purposes" of Ch. 592, F.S. (§592.07, F.S.). The power and authority of the said board to acquire property is broad so long as it is suitable for and may be used for the purposes mentioned in said Ch. 592, F.S.

The said board "may grant privileges, leases, concessions, and permits for the use of lands for the accommodation of visitors in the various parks, monuments and memorials; provided *no natural curiosities or objects of interest shall be granted, leased or rented on such terms as shall deny or interfere with free access to them by the public.* . ." (§592.07, F.S.). The powers of the Board, enumerated in §592.07, F. S., are in addition to the powers vested in the Florida Park Service of the Florida Board of Forestry and Parks, the predecessor of the Board of Parks and Historic Memorials (§592.07 (5), F.S.). This brings us to a consideration of the powers and authority of the Florida Park Service of the Florida Board of Forestry and Parks. Under §589.23, F.S., the Florida Board of Forestry and Parks was authorized to establish and maintain a department, known as the Florida Park Service, for the purpose of acquiring, developing and administering Florida State Parks, in cooperation with the National Park Service, the Trustees of the Internal Improvement Fund or any other governmental agency, (§589.23, F.S.) or with counties (§589.24, F.S.). The said Florida Board of Forestry and Parks was authorized, with the concurrence of the Trustees of the Internal Improvement Fund and the governor, to sell, exchange or lease or otherwise dispose of any lands under its jurisdiction by the provisions of this chapter (Ch. 589, F.S.) when in its judgment it is advantageous to the State to do so in the interest of the highest orderly development, improvement and management of the state forests and parks. *All such sales, exchanges or leases, or disposition of such lands, shall be at least upon a thirty days notice, to be given in the manner*

deemed reasonable by the said board." (§589.10, F.S.). The Florida Board of Forestry and Parks had "the power to charge reasonable fees, rentals or charges for the use or operation of facilities and concessions in state parks." (§589.25, F.S.).

From the above and foregoing authorities and observations we feel that the Board of Parks and Historic Memorials may grant grazing leases or permits encumbering its park lands when the use of such lands will in no way interfere with the proper and orderly use of its parks by the public and when such leases will violate no contract between it and persons, firms or corporations. Special attention is directed to deeds, contracts and agreements where lands have been donated or otherwise turned over to the board for park purposes, wherein there may be limitations or restrictions prohibiting the use of such lands for other than park purposes; these instruments should be examined to determine whether grazing leases or permits would be in violation thereof and if so no such leases or permits should be made or granted. This opinion does not pass upon the power and authority of the board to grant oil, gas, mineral or other leases, but is limited to grazing leases and permits. The making of oil and gas leases by most state boards and agencies is governed by §§253.51 et seq., F.S.

CHAPTER XXXIV

CORPORATIONS AND BUSINESS TRUSTS

CORPORATIONS, GENERAL PROVISIONS

August 18, 1952—052-255.

CORPORATIONS FOR PROFIT—NAME—USE OF WORD CLUB

QUESTION: A certificate of incorporation, under Ch. 612, F.S., has been filed with the Secretary of State by subscribers thereto seeking to incorporate under the name, "Tampa Yacht Club Stables, Inc." The Secretary of State has been assured that "Tampa Yacht Club Stables" has been operating in connection with Tampa Yacht Club under that quoted name for twenty years. Do the provisions of §§610.31-610.36, F.S., prohibit the use of the word "Club" in said proposed corporated name?

To: *Honorable R. A. Gray, Secretary of State:*

The effect of §610.31 is to prohibit, in the interest of public policy for reasons enumerated, the use of the word "club" as a name, designation, or style for "corporate or other forms of business ventures conducted for profit."

Section 610.32 defines the term "club" and the type of organization with respect to which the term may be used; and provides that such word may "not be used or employed as a trade name or as a designation or style for business ventures or enterprises, or as a guise for commercial activities, operated for financial profit," with the proviso that such prohibition shall not apply to certain commercial enterprises not here relevant.

Section 610.33 provides, in part, that from and after three months subsequent to the effective date of Ch. 20840, Laws of 1941 (now §§610.31-610.36, F.S., both inclusive, as amended) "it shall be unlawful for any person, firm or corporation, directly or indirectly, to do business for profit under any trade name or designation or style which includes the word or term 'club'."

Section 610.35 provides: "The provisions of §§610.31 to 610.36, inclusive, shall not be applicable or enforceable against those organizations and institutions which have used designation of the term 'club' continuously for two years prior to June 1, 1941; and shall not be construed as prohibiting the use of the term 'club' in the name of country clubs, baseball clubs and golf clubs in this state."

Section 610.36 provides criminal penalties for violations of the provisions of §§610.31-610.35.

It seems that the case of *Surf Club vs. Tatum Surf Club*, 10 So. 2d., 554, is the only in which our Supreme Court has dealt with the application of any of the provisions of the above-mentioned sections. Other than to establish that such sections constitute valid police regulations, that case is not helpful here.

The effect of §610.35 is not to permit "organizations and institutions which have used designation of the term 'club' continuously for two years prior to June 1, 1941" to incorporate as corporations for profit under such names theretofore used by them. The effect of said section is to permit such "organizations and institutions" to continue to operate without incurring penalties prescribed by §610.36. Hence, the question is answered in the affirmative; that is to say, that by reason of the provisions of §§610.31 to 610.36, both inclusive, the use of the word "club" is prohibited in the name of this proposed corporation for profit.

CERTAIN CORPORATIONS FOR PROFIT

October 14, 1952—052-291.

CORPORATIONS—SEPARATE CHARTER—AMENDMENT

QUESTION: May a corporation organized under the provisions of Ch. 611, F.S., to engage in business as a safe deposit company, amend its charter to authorize it to engage in other kinds of businesses, for example, "the purchase of land and developing an orange grove or operating a small manufacturing business"?

To: Honorable R. A. Gray, Secretary of State:

It is assumed that the words "to engage in other kinds of businesses", as used in the question, refer to businesses falling in the category of those specifically described in the question, hence, businesses not included among purposes and enterprises detailed in §611.01.

The request for opinion does not state when this corporation was organized.

Subject to exceptions not here relevant, prior to July 15, 1925, corporations for profit were organized under corporation laws then existing, and which laws, as amended, now appear as Ch. 611. The effect of the adoption of Ch. 10096, Laws of 1925 (which as amended now appears as Ch. 612) effective July 15, 1925, and amendment of the law which is now §611.01, was to restrict the application of the provisions of Ch. 611, to those corporations organized subsequent to July 15, 1925, to engage in any of the businesses described in §611.01, and also to those corporations organized prior to said date (see §611.40). Since July 15, 1925, corporations for profit organized for purposes other than those described in §611.01 have been required to incorporate under the laws now designated as said Ch. 612.

One of the businesses described in §611.01 is that of a safe deposit company.

In view of the foregoing, it is my opinion the question is answered as follows:

(1) If the company was organized prior to July 15, 1925, under the corporation laws of this state which, as amended, now appear as Ch. 611, it may amend its charter only in the manner provided in §§611.26, and 611.28, F. S. (In addition to such sections, attention is directed to §§611.01 and 611.40; also see Opinion 046-419, 1945-46 Biennial Report 662). In such event, this safe de-

posit company may amend its charter in pursuance of the mentioned sections to permit it to engage in other businesses, as contemplated by the question.

(2) On the other hand, if this safe deposit company was organized on or after July 15, 1925, it may not amend its charter at this time to permit it to engage in such other businesses.

CORPORATIONS FOR PROFIT, GENERALLY

January 22, 1951—051-20.

CORPORATIONS—DEATH OF INCORPORATOR—REFUND OF FEES

QUESTION: Subsequent to the filing of a certificate of incorporation in the office of the Secretary of State payment of the fee required, and issuance of certified copy of such certificate of incorporation by said officer, all as contemplated by Ch. 612, F. S., but prior to said corporation transacting business, one of the incorporators died. It appears that death of such incorporator removed the need for such corporation. May the filing fee so paid by these incorporators at the time of the filing of the certificate of incorporation lawfully be refunded to them in view of the circumstances above set forth?

To: Honorable R. A. Gray, Secretary of State:

The above factual situation derives from recitations in the request for opinion and oral information received from the office of the Secretary of State.

It is apparent that at the time of the death of this incorporator, all things necessary to bring the corporation into legal existence, under the provisions of Ch. 612, F. S., had been accomplished. The fee paid at the time of the filing of the certificate of incorporation was \$412.00. Such fee was payable under §612.58, F. S., and this opinion is conditioned upon the assumption that the amount so paid was in pursuance of said section, — that is to say, that no item of excess payment is here involved.

Section 612.55, F. S., authorizes dissolution of a corporation, under circumstances therein set forth, before the payment of any part of the capital or the beginning of business. However, neither §612.58, fixing the filing fee as above indicated, nor any other provision of Ch. 612 or other law of this State authorizes refund of such filing fee after a corporation has been formed. It is to be noted that §215.26, F. S., authorizing repayment of funds by the Comptroller under circumstances therein set forth, is not here applicable.

The circumstances here found urge, in pursuance of equitable considerations as distinguished from controlling law, the return of this filing fee. Nevertheless, the fee was paid in pursuance of statute and it could be refunded only in pursuance of statute. In the absence of law authorizing the Comptroller to refund the same, the answer to the question must be and is in the negative.

February 25, 1952—052-51.

CORPORATIONS—DISSOLUTION—CHARTER—PROVISION LIMITING POWER

QUESTION: Where the charter of a corporation, organized

and existing under Ch. 612, F. S., contains a provision that "it shall require the unanimous vote and consent of all of the board of directors and stockholders to modify or amend this charter or to dissolve this corporation," is such provision binding or may the corporation be dissolved as provided by the statutes?

To: Honorable R. A. Gray, Secretary of State:

Under §612.03, F. S., the certificate of incorporation, which when properly filed and approved by the Secretary of State becomes the corporate charter, is required to contain certain designated things and "any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation and any provisions creating, dividing, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders, including provisions governing the issuance of stock certificates to replace lost or destroyed stock certificates; *provided, such provisions are not contrary to the laws of this state.*"

While under §612.06, F. S., an amendment of the charter of a corporation is effective "if it shall appear upon the canvassing of the votes that stockholders of record holding stock in the corporation entitling them to exercise at least a majority of the voting power, *or such larger proportion of the voting powers as may be required by the provisions of the certificate of incorporation . . .*," we find no similar provision relative to the dissolution of a corporation. Under §612.46, F. S., when it is deemed desirable by the board of directors that the corporation be dissolved a meeting of the stockholders of the corporation may be called, which meeting shall be held pursuant to notice as provided in §612.27, F. S., and "if at such meeting or any adjournment thereof *the holders of record of stock entitled to exercise two thirds of all the voting power* shall by resolution consent that the resolution shall take place, a copy of such resolution . . . shall be filed in the office of the secretary of state, who . . ."

Under §612.29, F. S., providing for the board of directors of a corporation, "unless the certificate of incorporation or an amendment thereof *shall provide for a lesser proportion*, a majority of the board of directors of the corporation, at a meeting duly assembled, shall be necessary to constitute a quorum for the transaction of business, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors . . ."

It is a general rule of law that the applicable statutes become by implication a part of each corporate charter (18 C. J. S. 422, §43). Where there is a conflict between the provisions of the certificate of incorporation and positive statutory provisions we feel that the statutory provisions control. Although the above mentioned provision of the said corporate charter may have amounted to a personal agreement among the incorporators, (however, this point we are not called upon to decide), we do not think that the state is bound by the same and may permit the dissolution of the corporation upon proceedings had in compliance with the statutes. You were, therefore, correct in permitting the dissolution when made in accordance with the provisions of the statutes.

AGRICULTURAL COOPERATIVE MARKETING ASSOCIATIONS

July 3, 1952—052-209.

COOPERATIVES—INCORPORATION—FEES AND TAXES

QUESTIONS: 1. What fees and taxes should be assessed by the Secretary of State against cooperatives incorporated under and by virtue of Ch. 618, F. S., with capital stock?

2. What fees and taxes should be assessed by the Secretary of State against cooperatives incorporated under and by virtue of §611.38, F. S., with capital stock?

To: Honorable R. A. Gray, Secretary of State:

Chapter 618, F. S., (which was derived from Ch. 9300, Laws of 1923, as amended by Ch. 14675, Laws of 1931), provides for the incorporation of Agricultural Cooperative Marketing Associations, whose membership is limited to those persons who may be engaged in "the production of any agricultural products" (§618.02, F. S.) which include "horticultural, viticultural, forestry, dairy, live stock, poultry, bee and farm products" (§618.01, F. S.). These corporations were doubtless designed as an aid to those engaged in the production of agricultural products. For an organization to be incorporated under this chapter it must bring itself within the purview of the said Ch. 618, which chapter is not a general business in corporation statute as are Chs. 611 and 612., F. S.

Under §618.04, F. S., the articles of incorporation of such an association are required to be filed with the Secretary of State "accompanied by a fee of ten dollars *which shall be the only fee required therefor.*" There is to be found in said Ch. 618 no charter tax or fees similar to those provided by §§611.04 and 612.58, F. S. Said §612.58, F. S., is a part of Ch. 612, F. S., which applies "to corporations incorporated, consolidated or reincorporated hereunder (that is under Ch. 612, F. S.,) or under Ch. 10096, Laws of 1925 (from which said Ch. 612 was compiled). It is therefore clear that §612.58 has no application to Ch. 618, F. S.

Corporations created under Ch. 611, F. S., are limited to those mentioned in §611.01 thereof, which include "cooperative associations," however, by reference to §611.38. There are certain limitations placed upon the incorporation of such cooperative associations. There is no indication in said Ch. 611 that the provisions of §611.04, relative to charter taxes and fees, have any application to corporations other than those incorporated under said Ch. 611.

We, therefore, hold that the fees mentioned in §618.04, F. S., are the only fees to be charged for cooperatives organized under said chapter; §§611.04 and 612.58, F. S., have no application thereto. This answers the first above question.

The charges and fees for cooperatives incorporated under Ch. 611, and especially §611.38, F. S., are the same as those applicable to other corporations incorporated under said Ch. 611. There is no distinction between the several kinds of corporations, including cooperatives, incorporated under said Ch. 611, as to the fees and

charges to be paid in connection with incorporation. This answers the second question.

UNIFORM LIMITED PARTNERSHIP LAW

September 8, 1952—052-269.

HOMESTEAD TAX EXEMPTION—PROPERTY HELD FOR LIMITED PARTNERSHIP

QUESTION: May one or more of the partners in a limited partnership claim homestead exemption from taxation in the real property of the partnership or a part thereof?

To: Honorable C. M. Gay, State Comptroller:

The so-called uniform limited partnership law has been substantially adopted in this State (see Ch. 620, F.S.), under which statute the limited partnership must be composed of one or more general partners and one or more limited partners (§620.01, F.S.). Under these statutes it seems that the general partners are liable for the obligations of the partnership as in ordinary partnerships, while the obligation of the limited partnership is limited to his contributions as provided in the partnership certificate (see §620.07, F.S.). The same person may be both a general and a limited partner (§620.12, F.S.). "A limited partner's interest in the partnership is personal property" (§620.18, F.S.). "A contributor, unless he is a general partner, is not a proper party to proceedings by or against the partnership. . ." (§620.26, F.S.).

New York appears to have adopted the uniform limited partnership act in 1922; it was held in *Alley v. Clark*, DC NY, 71 Fed. Supp. 521, that a limited partner has no property rights in the partnership assets. It has been held that the legal title to limited partnership property is vested in the general partners (*Madison County Bank v. Gould*, N. Y., 5 Hill. 309). The property of a limited partnership is usually held to be a trust fund for the payment of partnership debts (68 C.J.S. 1024, §475). In the absence of statute providing otherwise a partnership is not an entity which may hold real property in its firm name (68 C. J. S. 506, §72). Usually the title to real property acquired for partnership use is conveyed to the partners who hold title thereto in trust for partnership use and debts (68 C. J. S. 507, §72). Although the legal title to real property deeded to a partnership in its firm name may not pass under the conveyance an equitable title will vest in the partnership, and where the name of the partnership contains the name of one or more of the partners it is usually held that the conveyance will vest title in those partners whose names appear in trust for partnership use (68 C. J. S. 506, §72). We, therefore, feel that where real property is conveyed to a limited partnership that at least an equitable title vests in the general partners, and if their names appear in the title of the partnership legal title probably vests in them in trust for the partnership. If the conveyance was made to the partners by name then they would appear to hold title in trust for the partnership business. "In the absence of a statute to the contrary, real property which has been conveyed to a firm, or to partners in trust for a firm, is held by them as tenants in common, or, according to some authorities, at common law as joint tenants. . . ." (68 C. J. S. 511, §72).

Under §7, Art. X, of the Florida Constitution, homestead tax exemption may be claimed where title to the property is held "by the entireties, jointly, or in common with others." "It is clear that in jurisdictions in which homestead rights may be acquired in property held by tenants in common or joint tenance . . . a partner may claim a homestead in partnership property . . ." (40 C. J. S. 529, §89), subject, however, to the rights of partnership creditors and his copartners (40 C. J. S. 529, §89).

In the light of the above and foregoing statutes and authorities we feel that the general partners of a limited partnership, who appear to hold title to partnership real property, may claim homestead tax exemption therein to the same extent as the partners in ordinary partnerships may.

CHAPTER XXXV

INSURANCE

INSURANCE, INDEMNITY AND SURETY; GENERAL PROVISIONS

April 14, 1952—052-124.

"LOW-TWELVE CLUB BENEFIT FUND"—ASSESSMENT BENEFIT PLAN

QUESTION: Do the proposed activities of "Low-Twelve Club Relief Fund", more particularly described below, constitute the business of insurance subject to, and not exempt from, the insurance regulatory laws of this state?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The only information we have been furnished concerning "Low-Twelve Club Relief Fund" is found in a copy of the benefit agreement (referred to herein as "certificate") proposed to be issued by it to its members. The agreement as set forth in the face of the certificate is, by its terms, made subject to the constitution and by-laws of the organization. There is printed on the back of the certificate the "Proposed Constitution and By-Laws" of the organization. The printed matter follows the conventional form of a constitution; but Art. XII thereof refers to the "adoption of these By-Laws".

Relevant features of the nature of this organization and the certificate proposed to be issued by it to its members are summarized as follows:

Membership in a Masonic Lodge in Dade and Broward Counties is required for membership in the organization, but there is no connection between the organization and such lodges. The organization is an unincorporated voluntary association. Applicants for membership must be in good health and pay a fee varying in amount depending upon the applicant's age. Upon death of a subscriber, the beneficiary named in the certificate is paid an amount, depending upon the number of members, ranging from a sum equal to \$1.00 for each member to a maximum of \$1,000. Upon death of a member, the surviving members are each assessed \$1.10, and there shall be as many such assessments as deaths of members unless the Board of Trustees deem it advisable to waive the assessment or assessments. There is provision that a member forfeits membership for failure to pay any such assessment, but is subject to reinstatement upon payment of all assessments not paid by the member and the meeting of other conditions.

The plan here involved appears to be a meritorious one. It is quite apparent that no regulatory insurance laws of Florida are required to protect any part of the public against the proposed activities of the organization. Nevertheless, it must be borne in mind

that police regulations, as well as other laws, must be equally applicable throughout the governmental unit adopting them.

In view of the foregoing, in my opinion the question is answered as follows:

The proposed activities of such organization constitute the business of insurance within the purview of our regulatory insurance laws. *Section 625.01 (6) F.S.; State ex rel. Landis vs. Jones, 108 Fla. 613, 147 So. 230*; and it follows that the certificate proposed to be issued by this organization to its members is a contract of insurance. It is not an organization made exempt from the effects of our insurance laws by §637.59, F.S. Hence, the activities of this proposed organization as now constituted are not permitted under our laws, and the question must be answered in the affirmative.

The business of insurance may be engaged in within this state only when the insurer's form of organization complies with a form of organization provided by or recognized in our laws, and which insurer has fully complied with the laws necessary to qualify pertaining to its particular form. Under its form of organization, grave doubt exists that the association could qualify to engage in the insurance business in this state, even though it desired to do so. It does not meet the requirements of the law relating to fraternal benefit societies. *Ch. 637, F.S.* In its assessment features, the plan of the organization is similar to a benevolent mutual benefit association formerly permitted under the provisions of *Ch. 640, F.S.*, but which provisions since 1947, by §640.30, have been made unavailable for new associations of that nature.

December 22, 1952—052-333.

INSURANCE AGENTS—PERCENTAGE OF COMMISSIONS—DONATION TO CHARITABLE OR RELIGIOUS ORGANIZATIONS

QUESTION: May a life insurance agent lawfully agree to donate, and in pursuance of such agreement, donate, to a charitable or religious organization, a part of his commissions on policies of insurance written on the lives of members of such organization?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The provisions of §625.19, F.S., appear to be relevant to this question, and are quoted as follows:

"No insurer, by itself or any other party, and no insurance agent, solicitor or broker, personally or by any other party, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement for insurance on any risk in this state now or hereafter to be written, any rebate of, or part of the premium payable on the policy, or on any policy, or of agent's commission thereon, or earnings, profit, dividends or other benefits founded, arising, accruing or to accrue on such insurance or therefrom, or any other valuable consideration or inducement to or for insurance which is not specified, promised or provided for in the policy contract of insurance."

The request for opinion does not identify the particular charitable or religious organization involved. Reference is made in such request to "a charitable foundation" and to "a charitable and religious organization." In any event reasonably there is indicated a body of persons acting in concert to satisfy spiritual and humane demands of their natures as distinguished from materialistic ambitions. Laudable, essential and inevitable as the purposes of such an organization may be in the light of the prevalent occidental concept of the nature and value of man, it must regretfully be concluded that the plan described in the question to further the financial interests of the organization appears to constitute an inducement for insurance prohibited by §625.19.

Hence, the question must be answered in the negative.

INSURANCE COMMISSIONER

January 30, 1952—052-25.

INSURANCE POLICY—CANCELLATION NOTICE—CONSTRUCTION OF REQUIREMENT

QUESTION: Where a policy of insurance issued in this State contains a cancellation clause to be made effective upon a five days' written notice to the insured by the insurer, what are the requirements of said notice as to time of the giving of such notice?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It appears from your file that the notice actually involved in the question arose from a standard cancellation clause requiring a five days' notice to the insured, with a right to send the said notice by mail. We are not advised from the file whether the agreement for cancellation makes the mails the agent of the insurer or of the insured. If the mails are the agent of the insurer then it may be that time does not start to run until the receipt of the notice by the insured; but if the mails are the agent of the insured then time would seem to begin to run from the time the notice is delivered to the mails. It appears from the file furnished us in connection with the request for opinion that the notice in question was mailed by the insurer at 5:00 o'clock P. M. on June 25, 1951, and stated that the policy in question would stand cancelled as of 12:01 o'clock A. M. on June 30, 1951. It appears that there was no intervening Sunday in this period of time. The question before us is the sufficiency of that notice of cancellation.

"Where time is to be computed from a particular day, or when an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated, and to include the last day of the specified period." (*Savage v. State*, 18 Fla. 970; *Simmons v. Hanne*, 50 Fla. 267, 39 So. 77, text 79; *Croissant v. DeSoto Improvement Company*, 87 Fla. 530, 101 So. 37; *Anderson Mill and Lumber Company v. Clements*, 101 Fla. 523, 134 So. 588; *Nash v. Vaughn*, 133 Fla. 499, 182 So. 827; *Arcadia Citrus Growers Association v. Hollingsworth*, 135 Fla. 322, 185 So. 431; *Scarlett v. Frederick*, 147 Fla. 407, 3 So. 2d. 165; *Young v. Young*, 152 Fla. 712, 12 So. 2d. 885; *Blanton v. State*, 156 Fla. 694, 24 So. 2d. 232). In the last above case the court said that "we are com-

mitted to the rule that in computing duration of time—that is the period for which a condition shall exist—the first day is excluded; so that applying it here, 20 June should not be taken into account. The 21st was the first day, and at midnight one day had expired; at midnight the 22nd two days had expired; and at midnight the 23rd the third day terminated.” Following this rule, as to the question above presented, June 25, 1951, would be excluded and not counted; the first day would expire at midnight June 26th, the second at midnight June 27th, the third at midnight June 28th, the fourth at midnight June 29th, and the fifth at midnight June 30th—that is, the entire day of June 30th would be included, so that the five days’ period of time would have expired by July 1, 1951, at 12:01 o’clock A. M. This rule has been applied in connection of cancellation of insurance policies under cancellation clauses similar to the one mentioned above (29 Am. Jur. 264, §284; 45 C. J. S. 91, §450).

We find the following statement in 45 C. J. S. 91, §450, concerning the giving of such notice, “the notice must be given for the full time specified in the statute or policy, *but the fact that the notice fixes a shorter period than that prescribed in the statute or policy does not invalidate it* as a notice of cancellation to become effective at the expiration of the prescribed period, and, *when the notice declares that the cancellation is presently or immediately operative, it becomes effective at the expiration of that period.*” (See also 29 Am. Jur. 264, §284 and 6 Appleman, Insurance Law and Practice, 729, §4186).

The above observations seem to answer the above question. By way of comment it appears that the period of time mentioned in the notice was only a four days’ notice instead of a five days’ notice and therefore insufficient; however, under the rule mentioned in the last above paragraph we feel that the notice was sufficient to effect a cancellation of the policy on July 1, 1951, at 12:01 o’clock A. M., unless a loss under the policy had occurred prior thereto.

June 2, 1952—052-171.

INSURANCE COMMISSIONER—SERVICE OF PROCESS

QUESTION: Under §626.03, F.S., may the Insurance Commissioner of this State accept service of process issued and directed to insurers who have filed with the Insurance Commissioner the agreement contemplated by said section?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Section 626.03 requires in effect that every insurer, before it engages in the transaction of business in this State, shall first file an agreement with the Insurance Commissioner of Florida, agreeing on the part of the insurer filing the same that service of process in any civil action against it may be made upon any of its agents in this state or upon the Insurance Commissioner of this State. There is the further provision that the “agreement shall authorize such agent or Insurance Commissioner for and on behalf of such insurer or company, to accept such service of process, agreeing that such service of process upon such agent or the Insurance Commissioner, shall be valid and binding upon the said insurer or surety company.” (Emphasis supplied.)

The request for opinion states that for sometime the Insurance Commissioner has been accepting service of process received by mail, issued in actions instituted against and directed to insurance companies which have filed such agreements with him. There is further pointed out in the request for opinion an order recently entered by United States District Judge John W. Holland, in the District Court of the United States for the Southern District of Florida, Miami Division, Case 4260-M-Civil, wherein Christine Gallant, etc., was plaintiff, and William C. McKinney, was defendant, construing §§47.20 and 47.30, F.S. These last mentioned sections have to do with service of process upon nonresident motor vehicle owners. Section 47.30 provides in part that "Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the Secretary of State, or in his office, and such service shall be sufficient service upon a defendant who has appointed the Secretary of State as his agent for service of such process . . ."

In construing these sections mentioned, Judge Holland held in effect that it was not sufficient to mail a copy of the summons and complaint to the Secretary of State; that the statutes provide for substituted service of process upon the Secretary of State as agent of a nonresident using, or who has used, the highways of the State of Florida; that all statutes involving substituted service of process are to be strictly construed; that the words in §47.30 "service of such process" mean service by an officer authorized by law to serve process and does not include mailing by the plaintiff or his attorney to the Secretary of State. Because of this holding, the Insurance Commissioner now raises the question of his right to accept service of process under §626.03.

The above quoted part of §626.03 evidences that the agreement required to be filed by admitted insurers with the Insurance Commissioner provides that service of process in any civil action against them may be made upon the Insurance Commissioner. If it was the intention of this statute that service of such process must be made upon the Insurance Commissioner by an officer duly authorized to serve such process, it would appear that the remaining quoted words from §626.03 are redundant. It is difficult to understand that having agreed that service of such process may be made upon the Insurance Commissioner that it was necessary to provide that the Insurance Commissioner might accept such service of process, unless it was intended that the words "to accept such service of process" are to be given their plain and ordinary meaning.

My predecessor in office, on July 29, 1941, Opinion 041-343 (1941-42 Attorney General Reports, 719), in response to a question of the authority of the Insurance Commissioner to accept process of this nature, replied: "You are authorized to accept this summons. My reason for so ruling is because §6198, C.G.L., 1927, not only provides that service upon an insurance company may be obtained by service of process upon you, but it goes further and provides that you are authorized 'to admit' such service of process." While the wording of §6198, C.G.L. was different from the present wording of §626.03, and while the former words "to admit" service are now "to accept service", the opinion is still applicable, such quoted words being the same in meaning.

In view of the foregoing, in my opinion the question is answered as follows:

Until the proper courts in appropriate proceedings shall construe §626.03 on this point, the Insurance Commissioner is authorized to accept service of such process. Should the contention be made in any proceeding against such an insurer that the Insurance Commissioner has no authority to accept service of said process, the question may be judicially decided then. Should the Insurance Commissioner, in the absence of any court construction, refuse to accept service of such process and, thereafter, should some court hold that §626.03 authorizes him to accept service of the same, conceivably any damage which might result to a plaintiff suing one of these insurers by reason of delay consequent upon the refusal of the Insurance Commissioner to accept such service, might be visited upon him. On the other hand, if a court should hold that the Insurance Commissioner has no authority to accept such service, prior acceptance thereof by him could in no way place him in a position of liability in connection with any claim which some litigant might seek to assert against an insurer. Hence, in the absence of a court construction of §626.03 on this point, I reaffirm the above quoted opinion of my predecessor in office.

August 1, 1951—051-248.

LAWYERS TITLE GUARANTEE FUND—SECURITIES— VOLUNTARY DEPOSITS

QUESTION: Lawyers Title Guarantee Fund is in process of qualifying with the Insurance Department as a title insurer. May such insurer voluntarily deposit with the Insurance Commissioner under the authority of §626.25, F.S., U. S. Government bonds in which said insurer has invested \$100,000 in pursuance of §626.04, F.S.?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Section 626.04 provides that domestic insurers or surety companies shall not be licensed to engage in business in this state until they are possessed of or have \$100,000 actually invested in bonds of the United States or other securities or investments as described in said section.

Section 626.25 provides that a title insurer, among others described, may deposit with the Insurance Commissioner for the common benefit of all holders of its policies, cash or securities of the kind in which by the laws of the state it is permitted to invest or loan its funds, in such amounts as it may from time to time desire, in addition to all other deposits required by it by the laws of this state, which cash or securities shall be held by said Insurance Commissioner in trust for the purposes and uses specified.

It is to be noted that the voluntary deposit made in pursuance of §626.25 is declared a trust for the common benefit of the holders of the policies of the insurer making it. If properly all securities of an insurer representing its investment in pursuance of §626.04 may not be so deposited under §626.25, the prohibition against such action apparently must derive from the following reasoning: (1) §626.04 requires the minimum investments as therein prescribed.

(2) An insurer engaged in business of necessity incurs obligations other than and in addition to those arising from its contracts of insurance or as incidents of such contracts. (3) Since the investments required by §626.04 are not specifically declared to be for the benefit of policyholders it was the legislative intent that such investments should be maintained for the benefit of all possible claims, those arising under policies and those arising otherwise. (4) Hence such investments cannot be impressed with the trust mentioned in §626.25. We cannot adhere to such reasoning.

For many years it has been recognized that the business of insurance is subject to state control; and the valid exercise of the state's police power in that connection derives from the good of the public. 29 *Am. Jur.* 59, §22; *Appleman, Insurance Law and Practice*, Vol. 19, page 1, §10321. The public welfare here involved does not arise in connection with obligations of the insurer other than those connected with policies. Such state control is for the benefit of and justified by that large part of the public acquiring coverage in its various forms from insurers. Hence any attempt of the state to earmark funds or investments of an insurer for the benefit of creditors other than claimants under policies could be justified only if such were required of the ordinary business corporation in relation to its creditors; and such state action for the protection of the creditors of the ordinary business corporation has not yet been attempted.

While it appears that if such an insurer meets the investment requirements of §626.04 and otherwise complies with the law it is entitled to a certificate of authority, yet funds in excess of this or other statutory reserves or deposits are required. Take for example a stock insurer capitalized at \$100,000 and possessed of such sum from the sale of its stock, and possessed of no other funds. The proceeds from the sale of such stock must be invested in the \$100,000 of securities as described in §626.04. Thus an insurer qualifying must have additional funds for operating expenses; and it is assumed as a matter of practical necessity that in such a case the Insurance Commissioner will require the insurer to have such surplus as he may consider necessary for operating expenses. After such insurer is engaged in business its income must be such as to provide for expenses other than those required for deposits, reserves and policy claims. Any person other than a claimant under a policy becoming a creditor of such an insurer is charged with notice that such is the source of funds from which payment shall be made.

In relation to this question and these invested funds, whether the deposit is voluntary or mandatory the principle involved is the same. Let us take a domestic surety company capitalized at \$100,000 and possessed of \$100,000 in United States government securities as contemplated by §626.04. As a further condition to engage in business such a company is required to deposit with the Insurance Commissioner bonds of the United States of the market value of \$75,000; and the deposit is for the benefit of those claiming under fidelity, appearance, supersedeas or surety bonds of such a company (§§648.02, 648.10, 648.11 and 648.12, F.S.). We are informed that it has been the custom of the Insurance Commissioner to permit a surety company to use a sufficient amount of its investments under §626.04 to meet the \$75,000 deposit requirements of

\$648.02. It would seem that if any of such investments may be used for a required or voluntary deposit that all of such investments may be so used. Certainly there is no statute fixing standards allocating portions of such investments for, on the one hand, the benefit of policy claimants, and on the other hand, the benefit of other creditors.

In my opinion this title insurer, if it elects to do so, should be permitted to make a voluntary deposit in pursuance of \$626.25 of any or all the government bonds in which it has invested in pursuance of \$626.04. Hence, the question is answered in the affirmative. This opinion is limited to the specific question set forth above, and does not purport to consider any of the other things to be done prerequisite to the qualifying of this insurer as required by the statutes.

October 16, 1952—052-294.

CONTRACT OF INSURANCE—AGREEMENT—TELEVISION PICTURE TUBE SERVICE

QUESTION: Does the "Television Picture Tube Service Agreement", described below, constitute a contract of insurance under the laws of this state?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The foreign corporation (herein referred to as "company") issuing such agreement would enter into such agreements with persons in this state (herein referred to as "owners") if not prohibited by our laws. Subject to its terms, the agreement provides that in consideration of the payment of a certain sum, the company will install a new or reconditioned picture tube or repair the picture tube of a described television set during a period of one year. Other relevant provisions of the agreement are summarized:

(1) Should installation of a new or reconditioned tube become necessary, same will be furnished and installed by the company, the owner agreeing to pay reasonable labor charges for installation.

(2) The company will repair, free of cost to the owner, any picture tube which may become defective through normal use and which is repairable.

(3) The obligation of the company to install one new or reconditioned picture tube or repair a defective picture tube shall not apply where the tube has become defective as result of any cause except "ordinary wear and tear", or has been removed from the television set without the company's approval, or if the serial number of said tube has been altered or removed.

(4) The agreement would apply only so long as the described television set continues to be the property of the owner.

The question is answered as follows:

On the basis of the reasoning and conclusions set forth in former opinion of this office 050-250, dated May 22, 1950, addressed to

the Insurance Commissioner, the above described agreement, if issued in this state, would constitute a contract of insurance under Florida laws.

AGENTS

January 30, 1952—052-24.

INSURANCE AGENTS—APPLICATION FOR LICENSES— FELONY—CONVICTION—PAROLE

QUESTION: Does the fact that an applicant, for a license as an insurance agent for a life and health insurance company doing business in this State, has been convicted, in the Federal Court, of a felony disqualify him from receiving such a license?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It appears from your file in this connection, handed us with the above request for opinion, that the applicant in question was convicted in one of the Federal Courts of this State of an attempt to rob a bank and was sentenced to serve a term of nine years in the Federal Prison, but was paroled after serving three years of the said sentence. It appears from the application involved that the applicant intends to sell "industrial life" and "accident and health" insurance for a life and health insurer authorized to do an insurance business in this State.

Provision is made for licensing life and sick, accident and health insurance agents under Chs. 627 and 634, F.S., and the examination of such chapters fails to reveal any express prohibition against the issuance of a license to a person convicted of a felony. However, said chapters, in so far as they provide for the suspension or revocation of a license, make the conviction of a felony grounds for revocation of such a license; under §627.31, F.S., "the insurance commissioner may suspend or revoke the license of any life insurance agent, if, after due investigation, notice and a hearing . . . he determines that . . . the agent . . . has been convicted of a felony, or has otherwise shown himself untrustworthy or incompetent to act as a life insurance agent. Under §627.50, F.S., although the commission of a felony is not expressly made a ground for revocation, where an agent has "demonstrated lack of trustworthiness or competence to act as an 'accident and health insurance agent,' " etc.; doubtless the commissioner might take into consideration the conviction of a felony in this connection. To like effect see §627.66, F. S. Although the conviction of a felony is not made grounds for revocation in §634.13, F.S., the theme of the statute seems to be directed at the question of the trustworthiness and competence of the agent to act as such in this State. The general theme of the statutes seems to prevent such persons as are not trustworthy or competent to act as insurance agents from acting as such in this State.

Our conclusion is that, although the conviction of a felony is not made grounds for the denial of a life, or accident and health, insurance agent's license, we feel that it is an element to be taken into consideration by the insurance commissioner in determining the trustworthiness and competence of the applicant for a license. It is the duty of the insurance commissioner to protect the interests of the people of the State in their purchase of insurance through

agents. Where a person has previously been convicted of a felony the insurance commissioner should take that into consideration when passing upon the application of that person for an insurance agent's license; in this connection he may consider the nature of the crime for which the conviction was had and the rehabilitation of the person so convicted. The fact that the applicant has been convicted, although not requiring rejection within itself, is an element to be considered in connection with the application. These observations seem to answer the above question.

March 11, 1952—052-77.

COUNTY SCHOOL BUILDINGS—INSURANCE—REINSURANCE—AGENTS—DIVISION OF COMMISSIONS

QUESTION: Where an insurance agent in this State, representing a mutual insurer, is directed by the County School Board or its agent to write a policy of fire insurance covering the school building of the county, with the further direction that two-thirds of the coverage granted be reinsured among the insurers represented by twenty-six other insurance agents and that two-thirds of the commissions received by the agent writing the said policy of insurance be divided among the said twenty-six agents, may a portion of such commissions be divided among eleven of such agents whose insurers refused to write reinsurance?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It appears from the file that the agent writing the said policy and the fifteen agents writing reinsurance above mentioned are agreeable for a division of the said commissions with the said eleven non-reinsuring if such a division of commissions may legally be made under the applicable statutes and laws.

If it was the intention of the County Board to use the above method to allocate a portion of the county insurance to each of the twenty-seven agents recognized by it, it might be said that each of such agents controlled a portion of the said insurance business to the extent that he, being unable to place the same with any company represented by him, could "broker" it through the other agents who represented insurers willing to write the same. Under this theory of the case the eleven agents whose insurers refused to write the reinsurance could have brokered the reinsurance allocated to them to one or more of the other agents. Whether this was in effect done is a question of fact which we do not here determine.

Under §627.18, "any duly authorized and licensed insurance agent, solicitor or broker, of any insurer, may divide commissions received by or due to him, upon any insurance or surety business, with . . . any other duly licensed insurance agent or solicitor, who resides in this state and *who writes the same class of business* . . ." However, §627.20, F.S., provides as follows:

"No insurer, other than life insurers, shall pay any money or commission, or brokerage, or give or allow any valuable consideration to any person, partnership, association, or corporation not a duly licensed agent, for or because of service in negotiating or effecting a contract of insurance, or for collecting the premium thereon (except

for reinsurance, or for fees for legal services in and about the collection of past due premiums; or to regular salaried employees), nor shall any insurer effect or issue any such contract of insurance except through a duly licensed agent, who is a bona fide legal resident of Florida, as herein defined.

"The commission on all insurance covering risks in the State of Florida shall be due and payable only to a duly licensed agent of the State of Florida. *Any licensed agent may share with any other licensed agent his commission on insurance brought to him by such other licensed agent, provided such insurance business shall be of such character as the other licensed agent is authorized to transact for an insurance company for whom he is licensed as an agent.* Provided, however, that no Florida agent shall pay to any non-resident agent and/or broker a greater portion of any commission than such non-resident agent and/or broker might lawfully pay to a Florida agent."

Reading the two above mentioned sections of the statutes together we feel that, if the eleven agents in question may be considered as having brokered the reinsurance business allocated to them to the other agents, and the insurance written may be said to be of the same class of business or character of the business written by them, the commissions may be divided or shared with such eleven agents. This seems to answer the above question.

June 8, 1951—051-153.

INSURANCE COMMISSIONER—AGENTS—LICENSE SUSPENSION

STATEMENT and QUESTIONS: Some months ago, in pursuance of proceeding under §634.13, F.S., the Insurance Commissioner entered an order suspending the license of an insurance agent. The agent appealed the case to the Circuit Court of Leon County, Florida, as permitted by §634.14, F.S. The Insurance Commissioner fixed supersedeas bond of such agent in connection with the appeal at \$250. The appellant agent executed and delivered, through his attorney, to the Insurance Commissioner his personal check for \$250 to satisfy the requirements of the order fixing supersedeas bond.

(1) May the Insurance Commissioner accept a check as a supersedeas bond, in view of the provisions of §59.13 (2), F.S.?

(2) If answer to the first question is in the affirmative, what is the proper method for handling such check or the proceeds thereof?

No question is here raised or considered concerning the right of this agent to obtain a stay with respect to his order of suspension upon filing of the bond required by the Commissioner in a supersedeas order properly entered by such official.

Appeals of this nature are controlled by the provisions of §59.01, and particularly see subsection (1) thereof. It is to be observed also that §59.01 (1) (a) provides that "'Trial court' or words of similar

import include the state board, commission or other body from which an appeal may be taken."

Section 59.13 provides that every appeal shall operate as a stay or supersedeas under the conditions set forth in that section. It is sufficient here to state that an appellant may, at any time prior to filing his record on appeal, apply to the trial court for a good and sufficient bond payable to the adverse party, the amount and conditions of which shall be fixed by the trial court in pursuance of the directions of other parts of this section. Section 59.13 (2) provides that a "good and sufficient bond" means a bond with a principal and two good and sufficient personal sureties, or one surety, if a surety company authorized to do business in the State of Florida, when approved by the clerk or judge of the trial court or by an officer authorized by the order granting the stay or supersedeas.

Section 59.13 (8) provides in effect that by entering into a supersedeas or stay order bond, the surety submits himself to the jurisdiction of the trial court; that after motion and citation his liability may be enforced without the necessity of an independent action; "Provided, however, that this provision shall not be applicable to state boards, commissions and other bodies from which an appeal may be taken."

The quoted proviso concluding the preceding paragraph is to be construed as meaning that any supersedeas bond given to the Insurance Commissioner in connection with an appeal from an order of the nature here found may be enforced only in an independent action brought for that purpose.

Various sections of Ch. 903, F.S., provide the form and character of bail bonds. Section 903.16 permits a deposit of money or bonds as bail to the extent and under the circumstances set forth in that section; and §903.17 permits the substitution of cash bail for other bail. There is no provision, either in §59.13 or in Supreme Court Rule 35, pertaining to supersedeas or stay bonds, comparable to these mentioned provisions of the bail bond chapter. Such a supersedeas bond is provided as a matter of statute; and the form of the bond must substantially accord with the requirements of the statute providing the conditions for entering stay order and fixing the amount of such bond. (See *Gordon vs. Camp*, 2 Fla. 23; Am. Jur. Vol. 3, §§491-494, pages 175-177). In view of the quoted provisions of §59.13 (8) grave doubt exists that there could be enforcement of a supersedeas bond in the independent action contemplated by that subsection unless it was a "good and sufficient bond" substantially of the character and executed as provided in §59.13 (2).

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) This question is answered in the negative; that is to say, granting that this appellant is entitled to a stay order and that such order has been properly entered fixing the amount of supersedeas bond, such bond must conform to the requirements of §59.13 (2), which precludes the acceptance of check or the proceeds thereof in lieu of such a bond.

(2) In view of the answer to the first question, it is apparent that no answer is needed to the second.

May 28, 1952—052-166.

INSURANCE—CORPORATIONS—GENERAL AGENT—
LICENSES

QUESTION: May a corporation which is the "supervisory general agent" of an insurer authorized to engage in the fire, casualty and surety insurance business in this state, as defined by §627.55 (2), F. S., be licensed as a "licensed supervisory general agent" under the provisions of §§627.55-627.70, F. S.?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Sections 627.55-627.70, both inclusive, were originally Ch. 25414, Acts of 1949. Generally this legislation provides, under stated circumstances and subject to the controls found therein, for the insuring of risks in this state with non-admitted insurers. Section 627.55 (2) defines "supervisory general agent", as a general agent acting as company manager in this state for a fire, casualty or surety company authorized to engage in business in this state. Section 627.55 (3) defines "licensed supervisory general agent", as meaning such an agent licensed under §§627.55-627.70. Subsection 627.55 (4) defines "licensed agent" as meaning a person who holds a valid subsisting license as a resident agent for an insurer authorized to engage in the fire, casualty or surety insurance business in this state and which person is licensed under §§627.55-627.70. Attention is directed to §627.55 (6) defining "fire, casualty or surety insurance," as used in §§627.55-627.70.

It is to be observed from a reading of the sections last mentioned in the preceding paragraph that, subject to the provisions thereof, Florida risks in such fields of insurance may be insured with non-admitted carriers through licensed supervisory general agents and licensed resident agents. Apart from the particular legislation here dealt with, it is recognized that only individuals may be licensed as local resident agents of insurers in these fields of insurance authorized to engage in business in this state (see §625.01 (1) (a), (b), (c) and (d); also generally see §§627.01 to 627.27, F. S., both inclusive). Notwithstanding this feature of our laws limiting the licensing of local resident agents of admitted insurers to individuals, such rule is not to be invoked in relation to the licensing of a supervisory general agent under §§627.55-627.70 unless reasonably it appears from the wording of such sections that only an individual supervisory general agent, as distinguished from a corporate agency, may be licensed under such sections to place insurance on Florida risks with non-admitted carriers. In these sections a licensed supervisory general agent in several instances is referred to as "he", and in reading the sections if we were bound by certain of these designations found therein, we should conclude that such an agent must be an individual to be licensed under these sections. However, this statute was passed in 1949 and there is no doubt that as a part of Florida Statutes, terms used therein are subject to those definitions set forth in §1.01, F. S. Among those definitions we find that in construing such statutes, where the context will permit, the word "person" includes individuals, children, firms, associations, joint ventures, partnerships, estates, trusts, business trusts, syndicates, fiduci-

aries, corporations and all other groups or corporations (§1.01 (3), F. S.). It does not appear that there is anything in the context of §§627.55-627.70 which is an impediment to the application of this definition in construing the intent of the mentioned sections in relation to the above question.

A consideration of §§627.55-627.70, F. S., reasonably leads to the conclusion that a "supervisory general agent" which is a corporation and which is acting under a proper agency agreement as the company manager in this state for a fire, casualty or surety company authorized to engage in business in this state, properly may be licensed as a "licensed supervisory general agent" under and as contemplated by said sections. Hence, the question is answered in the affirmative.

REGULATION OF RATES FOR FIRE AND OTHER INSURANCE

October 3, 1952—052-286.

"LOSS CLAUSE"—LEGALITY OF FILING

QUESTION: Under the insurance rating laws of this state, is there any impediment to the consideration by the Insurance Commissioner, for his approval or disapproval of a filing made by a rating organization, under Ch. 629, F. S., involving an "unearned premium clause," such clause for use with all forms of property damage and time element contracts, except as to certain mentioned risks, not here relevant, as described below?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The "unearned premium clause" mentioned in the question is hereinafter referred to as "loss clause," the relevant part of which is quoted as follows:

"If a loss is paid under this policy, this insurance shall indemnify the Insured for loss of the pro rata unearned premium on the amount of such loss payment. This Company, however, may elect by written notice within sixty days after date of loss to reinstate this policy in the amount of such loss and, in consideration of such reinstatement, make no payment to the Insured as provided by this clause."

It appears from the request for opinion that objections to the approval of this "loss clause" were made to the Insurance Commissioner by representatives of the State Association of Insurance Agents; and upon receipt of such objections a hearing was held on August 11, 1952, for the purpose of giving all interested parties an opportunity to present their respective views concerning the legality of the filing. Following the hearing, the filing was temporarily disapproved, without prejudice, by the Insurance Commissioner for his further study. The quoted "loss clause" is self-explanatory. Quite obviously any clause which preserves the value of a policy, even in the event of loss, is in the public interest. The extent to which this clause would affect an insurance policy in which it might be incorporated would involve the premium rate to be charged for such a policy. Thus, it would seem that under

our rating laws the "loss clause" is subject to consideration by the Insurance Commissioner for his approval or disapproval.

The file of the Insurance Commissioner which accompanies this request for opinion consists, among other things, of copy of an order entered by the Insurance Commissioner of South Carolina concerning a like "loss clause" and also a transcript of the hearing held in connection with this matter, as above noted. Included in the order entered by the Insurance Commissioner of South Carolina is this finding: "It is my opinion that in the above procedure the companies are attempting to make the agent a part of the loss picture and in substance the agent would become a co-insurer of a fire policy in which a loss occurred."

In our consideration of this question we have engaged in two lengthy conferences with the officials of the Insurance Department and have deliberated with care the question presented in relation to the laws of this state, the supervisory powers of the Insurance Commissioner, and the effect this filing, if approved, may have with respect to agents selling policies in which such "loss clause" may be included. It would seem that the determination of the South Carolina Insurance Commissioner above-quoted cannot be justified under our laws. The relation between insurance companies and their agents is one of contract and in no way affects policy contracts. Unless and until the legislature of Florida, in a valid exercise of its police power, shall vest in the Insurance Commissioner regulatory powers with respect to company-agents agreements, that official has no supervisory powers with respect thereto. Hence, we cannot see that the question extends beyond the regularity of the filing under the provisions of our rating statutes.

We cannot invade that realm of discretion which is vested in the Insurance Commissioner to approve or disapprove rates. As the question of insurance rates may be involved in this filing, we must presume that the Insurance Commissioner will act lawfully in relation thereto under our rating laws and recognized standards.

Hence, conditioned and limited as above, in my opinion this question is answered in the negative; that is to say, there appears to be no provision under the rating laws of Florida which is an impediment to the consideration by the Insurance Commissioner, and his approval or disapproval, of this filing involving the above "loss clause." As indicated, it seems to us the only question to be considered by the Insurance Commissioner is that of rates in relation to policies which may contain such a clause. It therefore follows that if the Insurance Commissioner determines that rates to be applied to policies which contain such a "loss clause" are fair and reasonable within the contemplation of Ch. 629, then the above filing is subject to his approval.

REGULATION OF RATES FOR CASUALTY INSURANCE AND FIDELITY; GUARANTY AND SURETY BONDS

July 1, 1952—052-205.

INSURANCE COMMISSIONER—RATES AND FORMS— REQUEST FOR PHOTOSTATIC COPIES

QUESTION: May the Insurance Commissioner properly com-

ply with the request of one insurance company for photostatic copies of rate information filed with the Commissioner by another company in compliance with §630.03, F. S.?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Section 119.01, F. S., provides that "All state . . . records shall at all times be open for a personal inspection of any citizen of Florida . . ."

Section 119.03, F. S., requires that: "In all cases where the public or any person interested has a right to inspect or take extracts or make copies from any public record . . . any such person shall hereafter have the right of access to said records . . . for the purpose of making photographs of the same . . ."

Chapter 630, F. S., requires, among other things that all casualty companies file with the Insurance Commissioner ". . . every manual of classifications, rules and rates, every rating plan and every modification of the foregoing which it intends to use . . ." Although these records are primarily for the use and benefit of the Insurance Commissioner in carrying out the duties imposed upon him by Ch. 630, F. S., they are just as susceptible to public scrutiny as are any other state records.

There does not, however, appear to be any provision of the law which requires the Insurance Commissioner to have photostatic copies of such records made upon request. Although §626.26 allows the Commissioner to make microfilms or photographs of certain records in order to facilitate their storage, there is no indication that he should make photographs of any of his records to suit the convenience of the public generally.

Since there is no reason why the representatives of one insurance company should not be allowed to make photographs in the manner indicated by §119.03, F. S., of the records kept by the Insurance Commissioner in accordance with §630.03 (1), F. S., the Commissioner may furnish such photographs, provided he has the proper equipment for making them, upon receiving a reasonable compensation for the service rendered.

July 27, 1951—051-254.

MERCURY CAB CO.—TAXICABS—LIABILITY INSURANCE COVERAGE—FLEET RATE BASIS

QUESTION: Mercury Cab Co., under the circumstances set forth below, has under its control and supervision operation of numerous automobiles in the taxicab business, with headquarters located in Miami Beach, Florida. Properly may these motor vehicles be considered as being under one operating ownership and management as such words or similar words are used in approved rate filings, hereinafter described, in relation to bodily injury and property damage liability insurance coverage for such taxicabs?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Subsequent to receipt of this request for opinion, representatives of the Insurance Commissioner and this office, officers of the cab company, and agents of insurers furnishing the coverage here

involved, held a conference in Miami concerning this question. The facts set forth herein were obtained from the Commissioner's file which accompanied the request for opinion, a copy of a corporate charter mentioned below which has been furnished this office, and representations made by officers of the cab company and agents of said insurers at such conference. It is to be noted that the name of this concern "Mercury Cab Co.", as the same appears in the above question, is its name as set forth on its letterhead. However, the charter describes the company as "The Mercury Cab Owners Ass'n." Such organization will be referred to as the cab company.

The cab company was incorporated as a non-profit corporation on June 30, 1949. Pertinent features of its charter are quoted as follows:

"The objects and purposes, generally, of this association shall be to advance the welfare of its members; to present a united front on all proper matters affecting their common business interests; to collect and prepare data for presentation to legislative committees, regulatory boards, governmental bodies, and courts, in the interest of its members; to investigate, and to resist in any lawful manner, any attempt by any person, firm, corporation, group, association, board, or legislative body, to invade, by any act, combination, restraint, rule, regulation, order, decree, ordinance or legislative enactment, the rights, privileges and immunities of its members, granted by law; to establish, promulgate, and enforce in any lawful manner, reasonable and just business ethics between members and between members and other persons, firms, or corporations with whom they may do business; to engage in civic activities to advance the welfare of the community at large. This association shall also have, utilize, and exercise all the rights, powers and privileges permitted by law to non-profit corporations in the State of Florida."

* * * * *

"All male persons, twenty-one years of age or older, who hold a taxi-cab license or who have leased or who have obtained an interest in writing in a taxi-cab license issued by the City of Miami Beach, Florida, or any proper agency thereof, to operate a taxi-cab for hire, shall be eligible and shall be admitted to membership upon election by the Board of Directors or otherwise, as provided by the By-Laws."

Briefly, the operations of the company in relation to this question are sufficiently set forth as follows: Members of the cab company hold certificates of title to one or more taxi-cabs which are under the constant direction, supervision and control of those in charge of the company's office in Miami Beach, and such direction, supervision and control continues with respect to each of such taxicabs as long as the persons owning certificates of title thereto are members of the organization. When cabs are operated by persons other than the members, such drivers are selected by those controlling the operation of the company. The board of directors of the company imposes such initiation fees and membership fees and dues as may be necessary for cost of operating the company.

Members holding certificates of title to such vehicles, respectively, maintain them and receive the amounts earned by them, paying for the extra drivers necessary to keep them in operation; and insurance coverage for said taxicabs is paid by the respective members holding certificates of title thereto.

Whether under §617.01, F. S., there is legal provision for a non-profit corporation of this nature is not here decided. Furthermore, it is not the proper province of this office under the circumstances here found to question the action of the Circuit Judge who approved such charter. If it should ever be contended and judicially adjudged that there exists no legal basis for such a non-profit corporation, then it appears that the "company" would be a voluntary association, and that the charter and by-laws of the "company" would set forth the provisions of the agreement under which the association would operate. If such were ever determined, in relation to the question here the legal picture would remain unchanged.

Rates for insurance coverage of this nature must be filed with and approved by the Insurance Commissioner as prescribed in Ch. 630, F. S. Two companies authorized to do business in this state are interested in furnishing the coverage as described in the question for these vehicles operating under the direction and control of the cab company. If the members of the cab company who hold the certificates of title to these taxicabs operating under the cab company's name can obtain insurance coverage under insurance rates applicable to an automobile fleet plan, the cost of said coverage to each of said members will be materially reduced. The approved rate filings respectively controlling these two insurers concerning rates applicable to an automobile fleet plan contain, among other features, the following provisions:

"Any risk comprising five or more private passenger or commercial automobiles or three or more public automobiles, all under the same ownership and management, or an annual payroll of \$7,500 if a garage, for the bodily injury and property damage liability exposures to be rated shall be eligible for the application of this Plan."

* * * * *

"Any risk comprising five or more passenger or commercial automobiles or three or more Public automobiles, under one direct operating management and ownership, or an annual payroll of \$10,000.00, if a dealer, garage, repair shop or service station for Bodily Injury and Property Damage Liability exposures to be rated shall be eligible for the application of this plan."

It is to be noted that the underscored wording in the quoted portions of said filings are to the same legal effect. The words "the same ownership and management" and "one direct operating management and ownership," as used in such filings, must be considered in relation to the subject matter of insurance rates and insurance coverage. While those persons who hold certificates of title to these motor vehicles have surrendered the control and supervision of them to the cab company, for all practical purposes and as far as civil liability with respect to operation of such vehicles is concerned, the owners of them are those persons who hold

certificates of title thereto (Ch. 319, F. S.; *Lynch v. Walker* (Fla.) 31 So. 2d. 268). It is reasonably apparent that ownership and operation of motor vehicles within the intent of the above quoted rate filing provisions contemplate ownership under certificates of title and actual operation of the vehicles. Thus, it appears that the cab company while actually operating the vehicles is not the owner of them.

Subject to the further comments set forth below, this question is answered in the negative; that is to say, that the taxicabs under the supervision of the cab company, as contemplated by this question, are not being operated under "the same ownership and management" or "one direct operating management and ownership", as such words are used in said approved rate filings. Hence, it follows that the insurance coverage for these taxicabs mentioned in the question may not be furnished at rates applicable to automobile fleet plans as provided in the filings of said insurers. The conclusions reached in this opinion are in accord with our former opinion 049-342 (A.G.R. 1949-1950, page 354).

As indicated above, Ch. 630, F. S., deals among other things, with the regulation of rates for casualty insurance in this state. No insurer may make or issue in this state, a contract of insurance of the nature here dealt with except in accordance with rate filings duly approved by the Insurance Commissioner (Ch. 630, F. S., particularly §630.03 thereof). The approved filings of the insurers here mentioned and as above described, reasonably cause me to reach the conclusions set forth in the preceding paragraph. The factors employed in determining what is a proper rate fall more within the fields of the insurance actuary and accountant than in the field of the lawyer. Whether filings could be made by these insurers so worded as to permit the coverage on a fleet basis of the taxicabs operated by this company which properly could be approved by the Insurance Commissioner, involves the exercise of his judgment and discretion as to whether such would violate the prohibition found in Ch. 630 against unfair discrimination and involves these mentioned factors which must be called into play in the determination of proper insurance rates. If such filings could be made and approved, the coverage here desired by this cab company could be written. However, as long as the present approved filings of these insurers remain as they are, in my opinion the conclusion set forth in the preceding paragraph must stand.

It has been with considerable reluctance that I have been forced to arrive at the answer set forth above. That answer has resulted from more than ordinary consideration of the question. The question presents its controversial issues. If these interested parties desire to test the question in declaratory judgment proceedings, this office will cooperate in expediting such proceedings to obtain a court construction of the laws and contracts involved.

DOMESTIC MUTUAL FIRE INSURANCE ASSOCIATIONS

June 10, 1951—051-168.

AMENDMENT OF OPINION NO. 050-180

SCHOOL PROPERTIES—INSURANCE IN MUTUAL FIRE COMPANY

QUESTION: May a county school board lawfully insure

school buildings against a loss by fire, etc., under a policy issued by a mutual fire insurance company?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The recurrence of the question in this office in relation to the insuring of public properties is evidenced by our opinion 050-180 and the recitation in that opinion of previous opinions of my predecessors in office. Reference is made to that opinion. Since issuance of the opinion, the matter of the reconsideration of the questions therein set forth has seriously engaged the attention of this office. It is to be observed that such opinion accorded as closely as it was felt at all tenable with the previous opinions mentioned. Now with the question recurring it is thought proper to subject our previous holding to review.

The impediments urged in all these previous opinions to the unlimited right of public officers to insure public properties in a mutual company derived in whole or part from either or both of the constitutional and statutory provisions mentioned.

Article IX, §10, Florida Constitution, is as follows:

"Credit of state not to be pledged or loaned.—The credit of the State shall not be pledged or loaned to any individual company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual."

Section 632.13, F. S., is as follows:

"Certain policies not to be issued until corporation possesses certain surplus; proviso.—No such corporation shall issue any insurance policy for a cash premium and without contingent liability until and unless it possesses surplus of at least one hundred thousand dollars and not less in amount than the capital required of domestic stock fire insurance companies; provided, however, that any such corporation, organized and operating under this chapter, may issue policies of insurance covering property of this state, or of any county or municipality of this state, without contingent liability when such policy of insurance contains a provision that the state or any such county or municipality insured under it may not participate in the profits of such corporation." (Emphasis supplied)

It is to be observed from a reading of opinion 050-180 that it was therein held that public properties could be insured in mutual companies if the contracts of insurance issued were non-assessable and non-participating. The reason urged for the holding that the contract should be non-participating derived from the underscored wording in above-quoted §632.13; and that part of opinion 050-180 is quoted:

"The prohibition in §632.13 that the state or its subdivisions may accept the policy of a domestic mutual fire

insurance company only under the condition that 'it may not participate in the profits of the corporation,' obviously may not be sustained as a valid police regulation. Hence, the only other reasonable theory to support its validity is to accept it as a legislative recognition of the prohibitions in Art. 9, §10, Florida Constitution, and the legislative determination that acceptance by the state or its subdivisions of any 'profit' in connection with a policy issued by a domestic mutual would offend such constitutional provisions. As has been urged, in the ordinary sense of the term, there is no 'profit' involved in a dividend on a mutual policy; nevertheless, the word 'profit' as used in §632.13 is to be construed as 'dividends'. Such legislative construction is likewise applicable to a foreign mutual fire insurance company."

This finding is subject to modification. Whatever the purpose of the underscored wording in §632.13 may have been, or the reason therefor, it is to be construed solely in relation to contracts permitted to be issued by a domestic mutual fire insurance company organized under Ch. 632. No such companies are presently operating in this state. Until the question of the effect of such underscored wording shall be presented to this office in connection with a contract proposed to be issued by such a domestic mutual to a public body, no attempt will be made to construe it. Suffice it now to say that such wording, as legislative enactment, is not applicable to a foreign mutual company authorized to engage in business in this state. On the other hand, it is assumed that the provisions of Ch. 632 are constitutional; and certain things permitted domestic insurers under that chapter will be accepted as constitutional in relation to contracts of foreign mutuals. Thus, as stated in effect in opinion 050-180, in relation to the state or its political subdivisions, unless and until the courts shall hold that §§632.11 and 632.13 are invalid, a provision in a policy issued by a foreign mutual company to the effect that a policyholder is a member of the organization will not be construed as violative of Art. IX, §10, Florida Constitution. Attention is now directed to "dividends" normally payable by a foreign mutual fire insurance company.

The surplus of a mutual fire insurance company divisible as dividends to policyholders is derived from income from invested funds required to be maintained by the company and from savings from the amount by which policy premiums are loaded to meet expenses and possible extraordinary losses. "Dividends" payable to policyholders are not "profits" in the ordinary and accepted use of the latter term; and payment of a premium on a mutual participating fire policy is not an "investment." As stated in the case of *Wells vs. Metropolitan Life Ins. Co.*, 13 N.Y.S. 2d. 22, affirmed 18 N.Y.S. 2d. 170, dealing with a participating life policy (the principle therein dealt with being here applicable):

"The average policyholder purchasing a participating policy in a mutual company believes that his policy represents an investment and that he will share in the 'profits' of the company. That, however, is not the fact. The so-called 'dividends' are not dividends at all, in the accepted

and ordinary sense of the word. In fact they represent an excess premium or over-charge paid by the policyholder, and then returned to him, without interest less the costs attendant upon collection and administration and various other deductions. In *Rhine v. New York Life Ins. Co.*, 248 App. Div. 120, 289 N.Y.S. 117, affirmed 273 N.Y. 1, 6 N.E. 2d 74, 108 A.L.R. 1197, Mr. Justice Dore, writing for a unanimous Appellate Division, said, 248 App. Div. at page 125, 289 N.Y.S. at page 123: 'As the policyholders in a mutual life insurance company have paid in more than was necessary, they are entitled to a return of such overpayments. The dividends of a mutual life insurance company are, accordingly, strictly speaking, not profits as in the case of an ordinary corporation, but really constitute a return to the policyholder of the amount he has been overcharged for his insurance. In life insurance companies operating on the mutual plan the whole of the divisible surplus is distributed among the members annually as equally as may be in the proportions in which they have contributed to it.'

"In other words, the policyholder creates his own surplus, by paying more for his insurance in advance than it should actually cost, based upon the mortality tables. At the end of the year, the exact amount of this excess is calculated by the company and returned pro rata to the policyholders. As Judge Lehman of the Court of Appeals said, in the *Rhine* case, 273 N.Y. at page 13, 6 N.E. 2d at page 78, 108 A.L.R. 1197: 'The declaration of a dividend upon a policy reduces pro tanto the cost of insurance to the holder of the policy. That is its purpose and effect.'"

Generally, concerning these matters, see also *Rhine vs. New York Life Ins. Co.* 248 App. Div. 120, 289 N.Y.S. 117, 273 N.Y. 1, 6 N.E. 2d. 74, 108 A.L.R. 1197; *Garafano Const. Co. vs. Lumber Mutual Casualty Ins. Co.* of N.Y., 26 N.Y.S. 2d. 780; Appleman, *Insurance Law and Practice*, Vol. 18, page 149, §10060.

With this understanding of the nature of a mutual company's "dividends", attention is now directed to the apparent purpose and intent of Art. IX, §10, Florida Constitution. The prohibitions there found, relating to the state and any "county, city, borough, township or incorporated district" thereof, reasonably pertain to business ventures for profit. A mutual insurance company is not organized for profit. Thus, it is not apparent that acceptance by the state or any political subdivision thereof of a participating policy of a mutual fire insurance company would make the state or any such political subdivision "a joint owner or stockholder" within the meaning of such constitutional provision.

In view of the foregoing, in my opinion the above question properly is answered as follows:

A county school board may insure school buildings against loss by fire, etc., under a policy issued by a mutual fire insurance company, provided, that the policy issued for such coverage stipulates, in effect, that it is issued without contingent liability of the school board and that it is non-assessable. The fact that the policy is a participating one will not render it questionable and such a provision

is permitted. Former opinion 050-180 is amended to the extent that the conclusions stated therein are at variance with the findings set forth herein.

As stated above in this opinion, should this question ever arise in connection with proposed coverage of public properties by a domestic mutual fire insurance company under Ch. 632, the question will then have to be considered in the light of the underscored wording of §632.13.

LIFE INSURANCE, GENERALLY

June 10, 1951—051-154.

LIFE INSURANCE COMPANY—SALES MANAGERS— CONTRACTS BETWEEN

QUESTION: Something over a year ago, a domestic mutual life insurance company (herein referred to as mutual company) entered into an agreement with a domestic stock life insurance company (herein referred to as stock company) whereby the latter "reinsured the policyholders" of the former, and such former company thereupon ceased operations as an insurance company. On March 7, 1950, the stock company entered into a contract with two persons (herein referred to as "A" and "B") who were respectively president and vice president of the mutual company, whereby such individuals were designated sales managers for the stock company in Florida, Georgia, Alabama and South Carolina (referred to in contract as "regional Territory") compensation payable for their services and other relevant particulars being set forth below. In view of the fact that "A" and "B" were such respective officers of the mutual company, did such contract "violate the laws of the mutual companies and officers of mutual companies dealing with their policyholders?"

To: Honorable J. Edwin Larson, Insurance Commissioner:

It is stated at the outset that, with two minor exceptions, we have seen no reason to consume time by examining the rather voluminous files in the office of the Insurance Commissioner to obtain details of the arrangements whereby the stock company took over the business of the mutual company; but have relied upon oral information furnished by the Commissioner's office. It is further to be understood that the question of the validity of the contract mentioned is limited to possible duties of the Insurance Commissioner in relation to such contract; and this opinion will avoid dealing with the question of the validity of that contract to satisfy possible contending claims of those who executed the same.

Technically, the contract whereby the stock company took over the business of the mutual company was not a "reinsurance" arrangement as expressed in the request for opinion, but was an assumption by the former company of the policy liability of the latter company. Thus, such contract as was consummated between these companies was an assumption agreement. As we understand it, certain effects of the agreement were as follows: in relation to policyholders of the mutual company, there was an assumption of liability by the stock company; as an operating insurance company

the mutual company has ceased to function; those policyholders of the mutual company who saw fit to accept such assumption by the stock company have long since agreed to such assumption; and if any member of the mutual company seriously questions the regularity of any phase of the proceedings whereby the stock company assumed the mutual company's contracts, such fact has not been called to our attention.

The following characteristics of the mentioned contract between the stock company and "A" and "B" are sufficient here. As compensation for their services as sales managers of the stock company in the regional territory described, they were provided basic annual salaries of \$10,400 and \$7800, respectively, subject to increase or decrease depending upon premium income, including produced or purchased premium income, in relation to certain monthly and annual minimum figures; and in addition the sales managers were to receive a commission on the total monthly premium income derived from business assumed by the stock company from the mutual company, such commissions to be payable as long as said premium income exists— $\frac{2}{3}$ of such commission to "A" and $\frac{1}{3}$ to "B", and in event of death of either of such parties, payable to their respective estates.

We are now called upon to advise if the contract between the stock company and these former officers of the mutual company violated "laws of the mutual companies and officers of mutual companies dealing with their policyholders." It is recognized that if these officers of the mutual company, because of promises of reward or benefits to accrue to them in the event the assumption contract was executed with the stock company, unduly exerted influence or pressure on the other officers or members of the mutual company to accomplish such purpose, the validity of such contract providing the benefits and the entire assumption agreement, as a matter of public policy, might have been questionable. In the absence here of facts indicating that such improper conduct or pressure were indulged in by these officers in relation to the assumption contract, obviously we cannot presume that such was done. On the other hand, we are informed from the files in the office of the Insurance Commissioner that the stock company took over the business of the mutual company at the Commissioner's suggestion. Since the assumption of liability and the terms and conditions of the contract providing for it were approved by the Insurance Commissioner, we therefore assume: (1) Such contract was in the interest of public welfare. (2) The affairs of the mutual company were in such state that the best interests of the policyholders of the company were served by the contract. (3) The execution of the contract was within the charter powers of both said companies. (4) The contract was executed by said companies only in full pursuance of necessary preliminary legal action by stockholders, directors or member policyholders, authorizing the officers of the respective corporations to enter into and execute the contract.

As we have indicated above, contracts of mutual policyholders have long since been assumed by the stock company and, as far as we are informed, there exists no dissident group of mutual policyholders questioning the regularity of the transaction whereby

the assumption agreement was entered into. In relation to the duty of the Insurance Commissioner with respect to the mutual company, any question of the validity of the contract between the stock company and these former officers of the mutual company could have been raised only in connection with the validity and regularity of the assumption agreement. Since the rights of policyholders have accrued in pursuance of the assumption agreement, and the mutual company has ceased to function as an insurance company, apparently any move now to disturb the situation would only result in confusion and possible loss to these policyholders.

It appears that the real question now, as far as the Insurance Commissioner is concerned has to do with whether, in relation to the insurance business of the stock company, the total coverage involved, the reserve requirements and, hence, the rights of policyholders of the stock company, this contract between the stock company and these two former mutual company officers and the amounts required to be paid thereunder is in accord with safe and recognized insurance practices. Whether or not such is true is a matter which lies peculiarly within the knowledge and judgment of the Insurance Commissioner, involving as it does primarily principles of sound insurance practice and accountancy, in relation to the stock company, as distinguished from principles of law.

This opinion is not to be construed as touching upon the question of the validity of the contract as between the stock company and these former mutual company agents; neither is it to be taken as an approval of the contract as a business practice. If this mutual company was operated as a mutual company, these former officers had no greater claim to or property right in the business or contracts of that company than any other member. Hence, it is rather difficult to understand the justification for the stock company's commitment to pay these former mutual officers a commission on premiums received on contracts issued by the mutual company and assumed by the stock company.

July 10, 1952—052-212.

SUPPLEMENT TO OPINION NUMBER 052-180
INSURANCE—GROUP LIFE PLAN—PRESBYTERIAN
CHURCH U. S.

QUESTION: Opinion 052-180, dated June 10, 1952 addressed to the Insurance Commissioner, held in effect that issuance in Florida of group life insurance under a proposed plan covering personnel of those churches and/or agencies which are operating under the control of the General Assembly and/or the Synods and/or the Presbyteries of the Presbyterian Church, U. S., was not permitted under provisions of §§635.24-635.26, both inclusive, F.S. A review of that opinion is now requested by the Insurance Commissioner on the basis of additional information covering issuance of such insurance coverage, set forth in a letter to the Commissioner by the Manager of Group Administration, Home Life Insurance Company, the insurer proposing to issue such coverage, such additional information being summarized as follows: (1) All negotiations leading up to the making of the contract of insurance took place outside this state. (2) The group master policy will not be issued or delivered in

this state. (3) Individual certificates to be issued to insured persons are not made a part of the master contract. In the light of such additional information, would the issuance of such coverage, in so far as it insures personnel of the Church in Florida, violate the provisions of §§635.24-635.26, both inclusive, F.S., or any other insurance laws of this state?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

The additional information furnished evidences that this group life coverage is controlled by laws of a state or states other than Florida. See *Boseman vs. Connecticut General Life Insurance Company*, 301 U. S. 196, 81 L. Ed. 1036; *John Hancock Life Insurance Company vs. Dorman, CCA*, 9th Cir. 108 F. 2d. 220. Other authorities could be cited.

In view of the additional information thus furnished and the conclusion reached in the preceding paragraph, the issuance of such coverage, even though Florida residents are among personnel of the Church to be insured, will not be violative of §§635.24-635.26, both inclusive, F.S., or any other insurance laws of this state. Hence, this opinion is substituted for our former opinion 052-180.

August 6, 1951—051-263.

GROUP POLICIES—LOCAL UNIONS—COMBINED MEMBERSHIP

QUESTION: May there be issued one group policy covering the combined membership of two or more "local" unions, belonging to and affiliated with the same national or international labor organization which, in turn, is an affiliate of American Federation of Labor?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

National or international labor unions which are affiliates of American Federation of Labor are organized on the basis of crafts in industry. Such a national or international organization is composed of "local" unions. The "local" unions are composed of members who are artisans or laborers in the particular field or fields of industry represented by such national or international organization.

Each such "local" union has its own constitution and by-laws and, within the limit of such constitution and by-laws and the recognized traditional purposes of labor unions, it is self-governing and makes its own determinations, except with respect to the exercise of those rights and powers retained to itself by the national or international organization to which the "local" belongs. Thus, it would seem that in so far as government and organization are concerned, the "local" union is a separate and distinct union within the ordinary and accepted understanding of the term.

Sections 635.24 to 635.26, both inclusive, F.S., set forth the circumstances under which the issuance of a group life policy in this state is permitted. Section 635.24 (3) provides, in part and in effect, that such a policy may be issued "to a labor union, in Florida, which shall be deemed the policy holder, to insure members of such union, for the benefit of persons other than the union or any of its

officials, representatives or agents," subject to the further requirements of said subsection. Section 635.24 (4) permits issuance of such a policy "to the trustees of a fund established by one or more employees *and* one or more labor unions," under the circumstances and conditions set forth in said subsection. This last subsection was discussed and construed in previous opinion 050-263 (A.G.R. 1949-1950, pages 540-543). That opinion considered, in part, the propriety of issuance of group life coverage of the employees of more than one employer, and states, in part:

"Any authority for issuance of a group life policy to such a group of employers must be found in subsection 1 (4), Ch. 25189, Laws of 1949. This subsection is ambiguous as to meaning. It begins as follows: 'A policy issued to the trustees of a fund established by one or more employers *and* one or more labor unions . . .'. In the light of the further provisions of this subsection, the question is whether or not the underscored quoted word '*and*' is to be given its conjunctive meaning or is to be construed as the disjunctive '*or*.' Unless such latter construction is tenable, obviously this policy may not be issued to this group of employers. It is elementary that the intent of a statute is the law (State v. Patterson, 67 Fla. 499, 65 So. 659); that the legislative intent is to be sought in construing a statute (Davis v. Florida Power Company, 64 Fla. 246, 60 So. 759; State v. Rose, 97 Fla. 710, 122 So. 225); and to attain this end the courts at times have been required to construe the conjunctive '*and*' as the disjunctive '*or*' (Crawford Statutory Construction, §188, and citations). A consideration of all the wording of subsection 1 (4) leads to the reasonable conclusion that the word '*and*' mentioned above in this paragraph is to be construed as though the word '*or*' had been used in its stead."

This same conclusion is applicable to labor unions.

Subsequent to issuance of that opinion, after several conferences with the Insurance Commissioner and representatives of the state organization of life insurance agents (the last such conference being held a little more than one month ago) this general understanding has been reached: (1) Unless and until the courts in a proper proceedings shall rule otherwise, this office is not receding from the position set forth in opinion 050-263. (2) It is recognized that a group life policy which does not conform to the requirements of one of the four subsections of §635.24 would be invalid. (3) To avoid confusion, this office at its last mentioned conference agreed to institute declaratory judgment proceedings to obtain a court construction of §635.24, which will be filed within the near future. (4) Until there has been a court determination of the intent and effect of said subsection last mentioned, it is recommended that group life coverage in pursuance of opinion 050-263 be not issued.

Since it is here concluded that a "local" union, as contemplated by the question, is a "labor union," as such words are used in §635.24 (3), under that provision of law it is not authorized that the combined membership of two or more "local" unions, as mentioned in the question, be insured under one group life policy.

Pending a court construction, as planned and suggested above,

of the intent and effect of §635.24 (4), it is recommended that no attempt be made to insure the combined membership of two or more of such "local" unions under the provisions of said subsection.

September 11, 1951—051-311.

INSURANCE—GROUP LIFE—GROUP CREDIT POLICIES— NONRESIDENT STATE

QUESTIONS: 1. Are the provisions of §§635.24 to 635.26, both inclusive, F.S., applicable to the insurance feature of the plan of First Investors Corporation as described and set forth below herein?

2. If the answer to the preceding question is in the affirmative, does such insurance feature of the mentioned plan conform with the requirements of the above mentioned statutes?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Section 635.24 provides that no policy of group life insurance "shall be issued or delivered in this state" unless it conforms to one of the types described in the four subsections of that statute. It is necessary to mention only one of such types here. Section 635.24 (2) authorizes a group life policy "issued to a creditor, who shall be deemed the policy holder, to insure debtors of the creditor" subject to the further conditions recited. In our opinion 050-540 of December 1, 1950 (A.G.R. 1949-1950, page 545) dealing with the propriety of group coverage of individuals participating in a savings plan proposed by Thriftsurance Corporation of Miami, Florida, it was held that the creditor-debtor relationship, as contemplated by said subsection, did not exist in connection with said plan; hence, that the proposed coverage was not authorized. The question here presents a different legal problem.

Attached to the request for opinion is a memorandum of the Florida attorney for First Investors Corporation, to which reference is made as to the nature of the plan and insurance feature here involved. This opinion is premised and conditioned upon the facts set forth in such memorandum.

First Investors Corporation of New York has been offering for sale in Florida periodic payment plans for the purchase of shares of the Wellington Fund Investment Trust. The plans afford a method of purchasing Wellington Fund Investment Trust shares on an installment basis. First Investors Corporation is admitted to engage in business and authorized to sell its securities in this state. In connection with its sale of such securities, First Investors Corporation has three plans. One of these plans has an insurance feature, which for low cost to a purchaser under such plan, insures that in the event of his death during the life of the plan, the balance then due under the plan will be paid. That is the plan here considered.

This insurance feature derives from insurance policies issued by Connecticut General Life Insurance Company of Hartford, Connecticut, and United States Life Insurance Company of New York. Both insurance contracts issued are creditors' group life policies, and are issued to First Investors Corporation for the benefit of purchasers under the plan. Applications for both policies were made in

New York, and the policies were delivered in that state. The premiums are paid to the insurance companies by the Pennsylvania Company, custodian of First Investors Corporation and the plan holders, which collects the monthly payments from the plan holders and holds the Investment Trust shares for them. In event of death of a plan holder, the insurance company pays over the amount of insurance to First Investors Corporation. Both contracts of insurance are qualified under and issued in pursuance of New York law. The insurance is furnished by First Investors Corporation at actual premium cost to the plan holder; there is no commission charge or load placed by First Investors Corporation, or any of its security salesmen, upon this plan with the insurance coverage.

We must inquire into whether this group coverage, if obtained under said plan by a person in Florida, would be controlled by the laws of New York or Florida. This involves the legal significance of the certificate issuable to the insured under the master policy. There is the further question of whether sale of this plan, with the insurance feature, by agents of First Investors Corporation would constitute sale of insurance in this state by unlicensed representatives of an insurer.

In group insurance of this type, the master policy usually evidences the contract; and individual certificates generally refer to the terms in the master policy, which latter sets forth the essential conditions of the insurance. In construing contracts of group insurance, the courts look first to the master policy. *Boseman vs. Connecticut General Life Insurance Company*, 301 U. S. 196, 81 L. Ed. 1036; *Moriarity vs. California Western States Life Ins. Co. (Cal.)* 65 P. 2d. 842, 70 P. 2d. 684; *Carruth vs. Aetna Life Ins. Co. (Mich.)* 280 N. W. 773. However, if the individual certificate contains terms or conditions not in the master policy or if ambiguities or conflicts exist between it and the master policy, the certificate may be a part of the contract and control. *John Hancock Mutual Life Ins. Co. vs. Dorman*, CCA 9th Cir. 108 F. 2d. 220; *Azanich vs. Metropolitan Life Ins. Co. (Pa.)* 180 A. 67, 180 A. 576; *Adair vs. General American Life Ins. Co. (Mo.)* 124 S. W. 2d. 657. Further, when the master policy provides that in event of conflict between it and an individual certificate issued in pursuance thereof, the former shall control, such provision has been enforced and observed. *All States Life Ins. Co. vs. Tillman (Ala.)* 146 So. 393; *Equitable Life Assurance Society vs. Austin, (Ky.)* 72 S. W. 2d. 716; *Austin vs. Metropolitan Life Ins. Co. (La.)* 142 So. 337. Then there is the general rule that a contract of insurance is controlled as to its nature, validity and construction by the law of the place where it is made, unless the parties thereto appear to have named or intended a different place to govern. 44 C.J.S. 504, §52. The principles found in the above cases are well evidenced and discussed in the *Boseman* and *John Hancock* cases mentioned.

The *Boseman* case involved group life and disability coverage of employees of Gulf Oil Corporation. *Boseman*, one of such employees, lived in Texas, and to him was issued an individual certificate in pursuance of the master policy. The master policy was, by its terms, controlled by the laws of Pennsylvania. The individual certificate, by the terms of the master policy, was not named as a part of the insurance contract. When claim was asserted by *Boseman*,

a question arose as to whether the laws of Texas or Pennsylvania controlled as to certain features. It is sufficient here to summarize these findings of the court in the case: the individual certificate was not a part of the contract, but merely evidenced rights of Boseman as set forth in the master policy; the master policy was a Pennsylvania contract; the master policy was controlled by the laws of Pennsylvania and not Texas.

The *John Hancock* case involved a master group life policy issued in Massachusetts covering employees of a California employer. On claim arising thereunder, the court made the following findings, among others: an employee was required to make application to the insurer to obtain the coverage; the individual certificate contained terms and conditions not set forth in the master policy; as far as claimant was concerned, his insurance coverage was in pursuance of a California contract, and the California laws controlled. Further, as we construe the case, the fact that application for the insurance was made in California had a bearing on the question of controlling law.

All cases mentioned deal with group coverage in connection with the employer-employee relationship; however, it would seem that the principles involved in them are relevant with respect to this type of group coverage. Just as here First Investors Corporation is the policyholder, so in the contracts considered in said cases the employer was the policyholder. There is a sharp conflict of authority as to whether the employer acts as agent for the insureds (covered employees) or the insurer in procuring and keeping such group insurance in force. Certain of the authorities which hold that such an employer is the agent of the insured group are, *Boseman vs. Connecticut General Life Ins. Co. supra*; *Lancaster vs. Travelers Ins. Co. (Ga.) 189 S. E. 79*; *Leach vs. Metropolitan Life Ins. Co. (Kans.) 263 P. 784*; *Reed vs. Metropolitan Life Ins. Co. (Mich.) 256 N. W. 610*; *Bahas vs. Equitable Life Assurance Society (Pa.) 200 A. 91*. Certain of the cases holding otherwise are, *Shanks vs. Travelers Ins. Co. D. C. Okla. 25 F. Supp. 740*; *All States Life Ins. Co. v. Tillman, supra*; *John Hancock Mutual Life Ins. Co. vs. Dorman, supra*. We are inclined to adopt the first theory mentioned as the better rule, at least as applied to the instant case as conditioned below.

Both Connecticut General Life Insurance Company and United States Life Insurance Company are admitted to engage in business in this state. We do not consider this a relevant factor.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) As to Florida persons purchasing securities under this plan and issuance to them of individual certificates evidencing coverage under the master group policy, such group insurance will not be subject to or controlled by §§635.25 to 635.26, both inclusive, F. S., if the following circumstances and conditions in connection with such group coverage exists: (a) The master policy provides that the laws of the State of New York shall control or, in the absence of such provision, such policy was delivered to First Investors Corporation in that state in pursuance of its application in that state for such group coverage. (b) Such master policy insures the entity or

group composed of all persons wherever located who may purchase securities under this plan, and the insurance coverage is afforded to a prospective plan holder without the necessity of application by him to the insurer as a condition that the coverage will be extended to him. (c) The named policy holder is First Investors Corporation, and as between the insurer and a plan holder, no obligation under the contract provisions rests upon the plan holder to transmit premiums to the insurer. (d) The terms of the individual certificate issued in pursuance of the master policy are not in conflict with the terms of the latter, does not set forth terms and conditions additional to those set forth in the master policy, and by the terms of the master policy is not made a part of the insurance contract.

If these conditions and circumstances exist, the laws of the State of New York will control with respect to such group coverage in relation to a Florida plan holder, and in that event §§635.24 to 635.26, both inclusive, will not be applicable to such coverage; and the issuance of such plan with its insurance feature by agents of First Investors Corporation in Florida will not constitute the unlawful sale of insurance by them in this state.

It is suggested that the Insurance Commissioner request that copies of the master policy or policies and individual certificates issuable in pursuance thereof evidencing this group coverage be delivered to him for his examination so that he may ascertain if the coverage involved meets the conditions set forth above. Unless such conditions are met, it may be that under the principles of law discussed above this group coverage issued to a Florida plan holder may be controlled by Florida law, and in such event would not be authorized.

(2) If the group coverage here described is determined to be governed, as to Florida plan holders, by Florida law, particularly §§635.24 to 635.26, both inclusive, on the basis of the reasoning set forth in former opinion 050-540, issuance of such coverage in this state will not be authorized.

October 18, 1951—051-366.

LABOR UNION MEMBERS—GROUP LIFE COVERAGE— SOURCE OF PREMIUM

QUESTION: A labor union desires to obtain group life insurance coverage for its members or certain class or classes thereof in pursuance of authority granted by §§635.24 (3), F.S. The union has at this time a mortuary fund comprised of 40% of the funds realized by virtue of a general annual assessment on the membership. It is proposed to set aside a portion of said mortuary fund for the payment of the members' portion of the premium required for such group life insurance, the union to pay the balance of the premium from general funds other than the mortuary fund. In view of the provisions of §635.24 (3) (b), F.S., properly may a portion of said mortuary fund be so used for the payment of the members' portion of the premium for said group life coverage?

To: *Honorable Graham P. Stansbury, Attorney, St. Petersburg, Florida:*

Section 635.24 (3) (b) provides in part and in effect that the

premium for such policy shall be paid by the policy holder (the labor union) partly from union funds and partly from funds contributed by the insured members specifically for their insurance, which members' contribution shall in no case be less than 25% of the premium nor more than 50% of the premium.

There has not been made available in connection with the request for opinion copies of the constitution and by-laws of the union. Provisions of these may be relevant with respect to the disposition of union funds.

From the statement of facts set forth above, it appears that the mortuary fund of the union is part of a general annual assessment imposed on the members of the union. Thus, it is to be considered a part of the general funds of the union so long as it is derived from the source mentioned; and so considered, grave doubt exists of the propriety of using any part of the mortuary fund for payment of the part of the premium to be contributed by the insured members. It is here remarked that unless there are impediments in the provisions of the constitution and by-laws of the union, it would appear that all or a part of said mortuary fund might be used by the union to pay its part of the premium for such group coverage.

The part of the premium payable by the members of the union covered by the policy is to be derived from such members specifically for such coverage. It is permitted that a special assessment be imposed upon the insured members for this purpose, which assessment as to each member shall equal or approximate as closely as possible the amount required of such member for his contribution in connection with the payment of said premium. On the books of the union, the funds so derived by this special assessment should be carried separate and distinct from other union funds.

FRATERNAL BENEFIT SOCIETIES

July 3, 1952—052-210.

FRATERNAL ORGANIZATIONS—PREMIUM TAX—EXEMPTIONS

QUESTION: Modern Woodmen of America, a fraternal organization under the laws of another state, has made application to be admitted to this state in pursuance of pertinent sections of Ch. 637, F.S. Relevant information available from the request for opinion and enclosures concerning such organization is set forth below. Is this organization entitled to exemption with respect to those taxes described in and as contemplated by §637.60, F.S.

To: Honorable J. Edwin Larson, Insurance Commissioner:

Attached to the request for opinion are the following papers: Affidavit of George H. McDonald, General Counsel, and Frank J. Gadiant, Actuary, of Modern Woodmen of America (hereafter referred to as "Society"); copy of resolution of Board of Directors of the Society; and copies of letters and other printed matter of the Society relating to certain activities of the Society, described below.

It is here assumed that the Society is a fraternal benefit society within the meaning of Ch. 637, F.S., and this opinion is conditioned upon such assumption.

On three previous occasions this office has issued opinions concerning §637.60, F.S. (Opinions 049-44, 049-250 and 049-467). The following is quoted from the first opinion mentioned:

"Under Section 637.60, as amended, in order for a fraternal benefit society to qualify as a 'charitable and benevolent institution', and be entitled to exemption from certain taxes, as provided in said section, in addition to the benefits it affords its members under certificates issued, it must (1) maintain in good faith an institution for the benefit of its members, or (2) maintain in good faith a 'fund which has for its purpose the care, education or other bona fide benevolent benefits to its members . . . '".

The Society urges the following activities and expenditure of funds, as set forth and explained in the mentioned affidavit and other data, as grounds for its exemption from the payment of the taxes mentioned in §637.60:

(1) Distribution annually to local camps of the Society, in connection with collection and remittance of dues, of a large sum (in 1951, \$838,338.92), to be used by local camps for (a) pay of secretaries for collecting premiums; and (b) cost of lodge room rent, keeping sick and needy members, paying premiums for distressed members and defraying other camp expenses.

(2) Benefits to polio victims among the paying members of the Society. The 1951 annual statement of the Society shows the item "Polio Fund \$40,000." During 1951, \$13,500 was paid out to members in this connection.

(3) The 1951 annual statement sets forth the item "Relief Fund Contribution \$24,929.39." From this fund the Board of Directors of the Society has authorized disbursements from time to time for relief of distressed members. It is not apparent whether this relief is confined to premium paying members only.

(4) The Society's program for Junior members, the purpose of which is allegedly to (a) provide good citizenship training; (b) combat juvenile delinquency; and (c) provide for the social adjustment of the child. Details of these activities are set forth in accompanying data. Approximately \$60,000 was spent by the Society in connection with these activities in 1951.

(5) Educational, fraternal, charitable, and benevolent work of local camps. It is alleged that in 1951 such camps spent \$102,000 for these purposes. Such purposes are not further explained or itemized.

The effect of the resolution of the Society's Board of Directors, mentioned above, is to "establish and maintain a fund of \$250,000 to be known as a Fraternal Activities Fund, from which the Board of Directors shall authorize disbursement of all fraternal benefits, including polio benefits for members affected with polio, payments for relief of members of the Society in distress, payment for the programs of education and citizenship training of its Junior mem-

bers and all other benevolent benefits payable by the Society to its members for which no premium is paid."

According to the 1951 statement of the Society, it collected that year in premiums \$15,132,620.97, and at December 31, 1951, its admitted assets amounted to \$167,646,729.05.

In view of the foregoing, in my opinion the above question is answered as follows:

I. It is admitted that at this time the Society is not possessed of "an institution for the benefit of its members" as described in §637.60, and, if exempt from the payment of the tax described in said section must evidence that it "maintains in good faith a fund which has for its purpose the care, education, or other bona fide benevolent benefits to its members." Thus, there must be maintained a fund from which is payable amounts for the care, education, or other bona fide benevolent benefits to members, in pursuance of a program or programs not dependent from time to time on the will of the Society's governing body, but a program or programs established, recognized and adhered to.

II. It does not appear that local camps of the organization are required to *expend* any part of the considerable sum annually returned to them, as set forth in paragraph (1) above, for those purposes quoted from §637.60, in the preceding paragraph. The activities of local camps set forth in paragraph (5) above cannot be said to be payable from a "fund" as contemplated by §637.60; neither is it apparent that such activities are in pursuance of fixed programs.

III. The incidence of polio in any group, including the group constituting the premium paying members of the Society, is so small that grave doubt exists that benefits payable therefor, as described in paragraph (2) above, constitute funds payable for the "care, education or other bona fide benevolent benefits to its members." Further, since such benefits are restricted to premium paying members, they merely constitute additional insurance coverage.

IV. Subject to the qualifying remarks set forth below, the moneys annually expended for relief of members, described in paragraph (3) above, and the Society's program for Junior members, described in paragraph (4) above, may constitute expenditures for the "care, education or other bona fide benevolent benefits" to the Society's members, as contemplated by §637.60. If this Society qualifies in this state and makes the following showing to the Insurance Commissioner, it shall be exempt from payment of the taxes mentioned in §637.60, to wit:

(a) That under a program or programs adapted and adhered to, it annually expends not less than approximately \$25,000 for the relief of members of the Society in distress, and annually expends not less than approximately \$60,000 in connection with the Society's program for Jun-

ior members. Notice is taken of premium receipts and admitted assets of the Society according to its 1951 statement, and also of the fact that no particular amount is required to be expended by \$637.60 to entitle a fraternal benefit society to the exemption. However, we are not willing to say that an annual expenditure of approximately \$85,000 for the purposes mentioned in this paragraph would not meet the requirements of \$637.60.

(b) Tax exemptions, whether stated in the Constitution or statutes, are to be strictly construed against the claimant and in favor of the taxing power (*Stewart vs. State ex rel Dolcimascola*, 119 Fla. 117, 161 So. 378). It is to be noted that to entitle a fraternal benefit society to the exemption provided by in \$637.60, the fund must have for its purpose the "care, education, or other bona fide benevolent benefits to its members . . ." The Society has premium paying members and those who are not premium paying members. The program or programs providing for the activities mentioned in preceding sub-paragraph (a) must make the benefits thereof available alike to all members, whether premium paying or not.

(c) The establishment and maintenance of the \$250,000 Fraternal Activities Fund, from which shall be payable amounts necessary to defray the cost of the activities described in above sub-paragraph (a).

SICK AND FUNERAL BENEFIT INSURANCE

June 11, 1951—051-155.

INSURANCE—SICK, FUNERAL AND DEATH BENEFITS

QUESTION: Under the provisions of §638.05, F. S., may a company, duly qualified and authorized to do a sick and funeral benefit insurance business in this state in pursuance of Ch. 638, F. S., with \$75,000 paid-up capital, issue any single policy to an individual providing death benefits of \$750.00?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

Chapter 638, F. S., regulates insurers engaged in the "sick and funeral benefit insurance" business. Section 638.14 provides, among other things, that Ch. 638 shall not affect the status or rights of life or accident insurance companies under the regular insurance laws. Hence, the question as here dealt with is to be related to an insurance company operating exclusively under the provisions of Ch. 638.

Originally, §638.02 provided that the amount of capital stock of an insurer organized under the laws of this state to transact exclusively the business of sick and funeral benefit insurance under the provisions of Ch. 638, should be not less than \$25,000. Section 638.02, as amended by Ch. 23671, Laws of 1947, increased the required amount of capital stock of such insurer to \$50,000, granting to insurers then qualified to July 1, 1948, to comply with the requirement. Section 638.02, as amended by Ch. 25404, Laws of 1949, increased the required amount of such capital stock to

not less than \$100,000, insurers then qualified to have until January 1, 1951, to increase such capital to \$75,000 and until January 1, 1953, to reach the required minimum of \$100,000.

Section 638.05 was originally §1 of Ch. 19307, Laws of 1939, and has not been changed. In effect it provides that an insurer authorized under Ch. 638 which has \$25,000 paid-up capital may issue or assume on any one risk, life policy, agreement or contract, death benefits not exceeding \$250, and if said insurer has \$50,000 paid-up capital, such death benefits may not exceed \$500.

It might be contended that where the paid-up capital of such an insurer is \$75,000 there exists no statutory limit on death benefits with respect to any one risk. There are two obstacles to such a position: we are here dealing primarily with sick and funeral benefit insurance as distinguished from life insurance and life insurers must be qualified as such under our laws; and regard must be had for the provisions of Ch. 642, F. S. (originally Ch. 24087, Laws of 1947).

Former Attorney General Watson, in opinion 044-183, dated July 7, 1944 (A.G.R. 1943-1944, pages 473-475) held in effect that under §625.01 (8), F. S., "health and accident insurance" is "sick and funeral benefit insurance." I agree with this conclusion; and it follows that "sick and funeral benefit insurance," as contemplated by Ch. 638, is "accident and sickness insurance" regulated by Ch. 642.

Section 642.03 relates to the form and contents of accident and sickness policies. Subsection (2) thereof provides that, "Any such policy may contain a provision for paying a benefit for death from any cause in an amount not exceeding two hundred and fifty dollars, which benefit shall not relieve such policy from the requirements of this chapter and all the provisions herein shall apply to such policy." We find the provisions of this subsection and those of §638.05, above mentioned, incorporated in Florida Statutes. As to a sick and funeral benefit company with paid-up capital of \$50,000, there is conflict in these separate provisions of our statutes; and as to such conflict, on the authority of *Lykes Brothers vs. Bigby*, 155 Fla. 580, 21 So. 2d. 37, it would seem that the provisions of §638.05 must yield to those of §642.03 (2), and such subsection controls as to death benefits in all such policies, regardless of the amount of paid-up capital.

The question is answered in the negative; that is to say, the death benefits which may be provided in an individual policy of insurance issued by an insurer authorized under Ch. 638, is limited to \$250, in pursuance of §642.03 (2).

June 21, 1951—051-176.

INSURANCE—SICK AND FUNERAL BENEFITS—

QUESTION: May a company authorized to do business under Ch. 638, F. S., with a paid up capital of \$75,000, issue a policy to an individual providing death benefits of \$750, if the policy provides for no other benefits?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It is to be noted that the above question is substantially the

same as that dealt with in opinion 051-155, but here limited to a policy providing death benefits only. It was held in that opinion that death benefits in an individual policy of insurance issued by an insurer authorized under Ch. 638 are limited to \$250 by virtue of §642.03 (2).

As pointed out in opinion 051-155, "health and accident insurance" is "sick and funeral benefit insurance", as contemplated by Ch. 638, which, in turn, is "accident and sickness insurance", regulated by Ch. 642. If any of the provisions of Chs. 638 and 642 are in irreconcilable conflict, the provisions of the latter chapter must prevail. *Beasley vs. Coleman*, 136 Fla. 293, 180 So. 625; *State vs. Cone*, 139 Fla. 437, 190 So. 698; *Lykes Brothers vs. Bigby*, 155 Fla. 580, 21 So. 2d. 37. On the other hand, while the provisions of these chapters, in relation to public welfare, are to be given liberal construction (*Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d. 234), a construction which will result in manifest repugnancy as between provisions of the chapters is to be avoided if possible, since repeals by implication are not favored. *Scott vs. Stone*, 129 Fla. 784, 176 So. 852.

Section 642.03 relates to the form and contents of accident and sickness policies. Subsection (2) thereof provides that, "Any such policy" — i.e. sickness and accident policy — "may contain a provision for paying a benefit for death from any cause in an amount not exceeding two hundred and fifty dollars . . ." There is here contemplated a policy which provides benefits in the event of sickness or accident and also death benefits not to exceed \$250. Policies of insurance contemplated by §638.05 may be of two general types, viz.: (1) providing benefits for sickness or accident and also death benefits; and (2) providing death benefits only. Applying the above rules of statutory construction, reasonably it appears that as to the former of these, in relation to death benefits, §642.03 (2) controls, and that §638.05 controls as to the latter.

A single policy to an individual, issued by an insurer operating in pursuance of Ch. 638, may provide benefits for sickness or accident *and also* death benefits; but under the provisions of §642.03 (2), such death benefits may not exceed \$250. This is in accord with opinion 051-155. But when such a policy issued by such an insurer provides death benefits only, the limits of the benefits are fixed by §638.05. The provisions of that section limit such death benefits to \$250 when the paid up capital of the insurer is \$25,000, and to \$500 when such capital is \$50,000. It does not follow that death benefits of \$750 may be provided in such a policy if the paid up capital is \$75,000, the limit for such death benefits remaining under the section at \$500. Thus, as to such a policy, the above question is answered in the negative. Opinion No. 051-155 is amended to the extent that the conclusions therein set forth are at variance with those stated herein.

BURIAL INSURANCE AND CONTRACTS

July 18, 1952—052-222.

DADE MEMORIAL PARK PROTECTION AGREEMENT— CONTRACT OF INSURANCE

STATEMENT and QUESTION: Attached to your request

is a form, headed "Dade Memorial Park Protection Agreement," facsimiles of which are purportedly being used by the Dade Memorial Park Corporation as evidence of contracts between itself and certain persons who desire to purchase cemetery plots which, it is assumed, are owned by Dade Memorial Park, Incorporated. According to the agreement it is necessary, in order to be eligible to participate in the "protection" offered by the Corporation, that a person shall (1) have purchased from the Company on installment payments, a plot in Dade Memorial Park, Inc., (2) be insurable, (3) execute an information form which the Corporation is required to use in order to obtain insurance on the purchaser's life, (4) submit to a medical examination if the insurance company so requires, and (5) designate a secondary beneficiary having an insurable interest in the purchaser's life.

In consideration of the above acts by a plot purchaser, the corporation, according to the agreement, will undertake to do the following things in the event of the death of the purchaser: (1) convey to the purchaser's secondary beneficiary a deed to the plot upon which the purchaser had completed or was still making installment payments prior to his death; (2) refund all payments previously made by the purchaser upon the lot purchased, except that part of those funds devoted to a "care fund;" (3) install on the plot a bronze family memorial valued at \$365.00; (4) install a grave marker valued at \$130.00; (5) install not less than two bronze corner markers valued at \$35.00; (6) pay \$100.00 for, or to apply upon, the purchase of a burial vault; (7) pay \$50.00 for, or to apply upon, the expense of interment services such as opening grave and renting of funeral paraphernalia; and (8) pay toward the covering of other funeral expenses a sum equal to the difference between an amount to be filled in by the parties to the agreement and the amount refunded to the secondary beneficiary.

The corporation further agrees, as indicated in the form, that it will procure at its own expense a non-cancelable five-year term life insurance policy on the life of the purchaser, the corporation being designated in such policy as the primary beneficiary. As indicated above, in regard to the acts to be done by the purchaser before becoming eligible to enter into this protection, the corporation does not intend to be bound by this agreement until the insurance company has accepted the corporation's application for the policy on the purchaser's life. Assuming that the Dade Memorial Park Corporation is not an insurance company qualified as such to engage in the insurance business in the State of Florida:

Does the Dade Memorial Park Protection Agreement described herein, constitute a contract of insurance?

To: Honorable J. Edwin Larson, Insurance Commissioner:

In the case of State ex rel Landis, Attorney General, vs. DeWitt C. Jones Co., 147 So. 230, quo warranto proceedings were instituted by the State on the grounds that the Jones Company, a funeral home, was writing funeral service contracts which had all the elements of insurance contracts and which were not permitted by the corporate charter of the company. In overruling the demurrer of the defendant in error and in holding that the Company

was illegally writing contracts of insurance the Supreme Court of Florida, quoting from Bouvier's Law Dictionary, defined an insurance contract as one "whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject, by specific perils."

It was further stated in the same case in a quotation from the Texas Court of Civil Appeals that "... 'Whether or not a contract is one of insurance is to be determined by its purpose, effect, contents, and import, and not necessarily by the terminology used, and even though it contain declarations to the contrary ... Nor is it essential that loss, damage, or expense indemnified against necessarily be paid to the contractee. It may constitute insurance if it be for his benefit and a contract on which he, in case of a breach thereof, may assert a cause of action ...' " (National Auto Service Corporation vs. State of Texas, 55 S.W. (2d) 209, 211.)

In analyzing the contract presently being considered, it is apparent that the corporation agrees thereby to provide funeral benefits to an eligible plot purchaser upon his death in return for such purchaser's paying stipulated monthly premiums. Apparently to protect itself against the risks assumed by it in the contract, provision is made for the insuring of the purchaser's life with an insurance company, the policy evidencing such insurance designating the corporation as the primary beneficiary. It is to be observed that these features of the agreement would appear to get into the field of reinsurance, but would in no way alter the fact that the corporation receives valuable consideration and in return indemnifies the purchaser's heirs or estate against the necessity of having to bear the entire expense of the funeral.

The Dade Memorial Park Protection agreement is not entirely a contract for personal services since its avowed purpose, as stated in the agreement, is "... To provide funds for the payment of the purchase price of said plot, in the event of the death of the purchaser and for other interment services as hereinafter set forth ..."

It is worthy of mention that the corporation has an insurable interest in the life of a purchaser of its cemetery plots only to the extent of the unpaid balance of the purchase price of the cemetery plot. However, in the absence of further facts on this point, no statement herein shall be construed as suggesting that the corporation has insured the life of any purchaser beyond its insurable interest therein.

Thus, on the basis of the "Protection Agreement" attached to your request, it is my opinion that such an agreement, when consummated, would constitute an insurance contract and would be violative of the insurance laws of Florida if entered into by a company not qualified to write insurance in Florida. Your question is therefore, answered in the affirmative.

BENEVOLENT MUTUAL BENEFIT ASSOCIATIONS

January 25, 1952—052-23.

FLORIDA EAST COAST RAILWAY EMPLOYEES BENEVOLENT ASSOCIATION—PROPOSAL

QUESTION: Is the enclosed proposal for a "Florida East

Coast Railway Employees Benevolent Association", subject to the insurance laws of the State?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It is noted that the contributions are voluntarily subscribed and it is recited in the proposal that no subscription shall carry with it any promise, agreement or understanding guaranteeing to such subscriber any definite amount.

"Insurer", as defined in §625.01, F. S., contemplates a person, firm, corporation, etc., issuing or entering into *contracts* or *policies* of insurance. The proposed plan in question would not seem to contemplate such a contract, and therefore the association is not within the definition of "Insurer".

Chapter 640, F. S., appears to be the only law which might be applicable to the plan in question, in so far as state insurance laws are concerned. That chapter contains laws relating to "Benevolent Mutual Benefit Associations", defined by §625.01 (2), F. S., as "any corporation, society, or other association operated upon the assessment plan, organized and created solely to protect and benefit its members from losses occasioned by dismemberment, or to benefit the widows, orphans, heirs, devisees, or estates of its deceased members."

It is not clear that the proposed association comes within this definition of a "Benevolent Mutual Benefit Association". However, even assuming that the plan does meet that definition, it seems that it would be exempt from the operation of Ch. 640, F. S., in light of §640.02 (2), of that chapter, providing that Ch. 640 shall not apply to "organizations or associations of employees employed by one and the same concern." Since the plan in question is for an association of employees employed by one and the same concern, namely the Florida East Coast Railway, it is apparently within that class of organizations which are exempt from the operation of the provisions of Ch. 640.

Therefore, it is my opinion that the question is properly answered in the negative.

HOSPITAL SERVICE PLANS

January 16, 1951—051-16.

OSTEOPATHS—PROFESSIONAL SERVICES

QUESTION: May the Florida Hospital Service Corporation, a corporation organized and operating under Ch. 641, F. S., contract for the payment of hospital services with a hospital owned and operated by osteopathic physicians and surgeons?

To: Honorable J. Edwin Larson, Insurance Commissioner:

I assume your question relates to the furnishing of hospital services only, and not to professional medical and/or surgical services, and this opinion is rendered on that basis.

A prior opinion of this office rendered by my predecessor (See 1947-48 Biennial Report, p. 562) held that hospitals owned and

operated by osteopaths are within the purview of Ch. 641, F. S., and that such hospitals could qualify under the hospital service plan or plans provided for and contemplated by the law. This prior opinion was primarily concerned with whether or not a group of osteopathic physicians could organize a hospital service plan under the cited statutes, to furnish services in their own osteopathic hospital; however, I believe the opinion is also pertinent to the instant question, where it is proposed that a hospital service plan, ordinarily contracting with regular medical hospitals, be permitted to contract with osteopathic institutions as well.

I find nothing in the charter of the Florida Hospital Service Corporation which would prohibit its contracting with recognized osteopathic hospitals for hospital services. The general nature and object of the corporation is, as stated in its charter, to establish, maintain and operate a hospital service whereby hospital care may be provided by hospitals designated or referred to in Ch. 641 of the statutes. As indicated above, a prior opinion of this office recognized that osteopathic hospitals are within the purview of this statute. Further, the only limitation in §641.03, F. S., relative to the contracting by a hospital service corporation with a hospital, is that such hospitals must be maintained by the State of Florida or any of its political subdivisions, or be a regularly operated and recognized hospital, or a hospital approved by the Insurance Commissioner. Since I assume the hospitals here in question are regularly operated and recognized, and are approved by your office, there appears to be nothing in this limitation which would preclude an affirmative answer to your question.

Hence, in my opinion, there is no prohibition against the Florida Hospital Service Corporation entering into a contract for the payment of hospital services with a hospital owned and operated by osteopathic physicians and surgeons and your question is accordingly answered in the affirmative. As stated above, however, this opinion relates only to the contracting for hospital services, and does not deal with the question of the furnishing of medical and/or surgical services by osteopathic physicians and surgeons under any medical and/or surgical service plan.

ACCIDENT AND SICKNESS INSURANCE

March 27, 1951—051-68.

FLORIDA RETAIL FARM EQUIPMENT ASSOCIATION— GROUP ACCIDENT AND HEALTH INSURANCE

QUESTION: Does a group health and accident policy issued by an insurer to Florida Retail Farm Equipment Association, more particularly described below, comply with the provisions of §642.04, F. S.?

To: Honorable J. Edwin Larson, Insurance Commissioner:

Among other things attached to the request for opinion are the following: (a) A booklet issued by Florida Retail Farm Equipment Association describing the group plan mentioned

above; and (b) copy of excerpt from the minutes of the fifth annual convention of said association, providing for amendment of constitution and by-laws of the organization relating to membership therein. The request for opinion does not have attached thereto a copy of the policy providing the insurance or certificates to the individual insureds. All information concerning this plan is derived from said booklet; and this opinion is conditioned upon the assumption that the booklet correctly describes the coverage issued.

No attempt is here made to deal with all provisions of such plan. In view of the conclusion reached herein, this opinion is concerned solely with the aspects of the coverage mentioned below. It is further noted that there is excepted from the effects of this opinion group coverage for public employees in pursuance of §§112.08-112.14, F. S.

Group accident and sickness insurance may lawfully be issued only to the groups and under the circumstances set forth in §§642.04, 642.05 and 642.06, F. S. It is apparent that the coverage here was attempted to be issued in pursuance of §642.04 (2), which in part provides: "'Group accident and sickness insurance,' is hereby declared to be that form of accident and sickness insurance covering not less than fifteen employees or members written under a master policy issued to any corporation, co-partnership or individual employer or any governmental corporation, agency or department thereof, or to any bona fide association, which association has a constitution and by-laws and has at least twenty-five members and is organized and maintained in good faith for purposes other than that of obtaining insurance."

The above mentioned copy of excerpt from the minutes of the organization evidences the following charges in the constitution of the organization: "That Article II, Section 2 of the constitution which reads as follows: 'To promote and maintain harmonious relations between the retail farm equipment dealers of the territory served—etc.' be changed to read as follows: 'To promote and maintain harmonious relations between the retail farm equipment dealers and their employees of the territory served—etc.'" Also, "That Art. IV, Section 2 of the constitution which reads as follows: 'Any person, firm or corporation regularly engaged in the retail farm equipment business in the state of Florida and carrying a stock of farm machinery and equipment commensurate with the demands of the community in which said business is located shall be eligible to regular membership, etc.—' be changed to read as follows: 'Any person, firm or corporation regularly engaged in the farm equipment business in the state of Florida and carrying a stock of farm machinery and equipment commensurate with the demands of the community in which said business is located, and the employees of any such person, firm or corporation, shall be eligible to regular membership, etc.—"

Those eligible for the coverage are described in the booklet as:

"All present full-time employees, including individual proprietors, partners, officers and managers, are eligible. 'Full time,' as used herein, means that the em-

ployee, partner, officer or manager shall work at the business 30 hours or more per week. Future new employees will become eligible as soon as they have completed three months of continuous active employment.

"If any employee is absent from work for any reason on the date his coverage would otherwise become effective as indicated on his enrollment card, the insurance will not become effective until he returns to work."

Conditions under which insurance terminates as set forth in the booklet are as follows:

"Your insurance under this plan terminates when you leave the employ of the company.

"Information may be obtained from the Association regarding the status of your insurance in the event of lay-off, leave of absence, or absence caused by disability."

The booklet sets forth "Insurance available following termination of employment."

In view of the foregoing, in my opinion the above question is answered:

(1) We are here dealing with the Florida Retail Farm Equipment Association, a state organization originally composed of persons, firms and corporations engaged in the retail farm equipment business, located in various communities of the state. It appears to have a constitution and by-laws. By amendments to its constitution and by-laws on or about October 31, 1950, employees of owners of such businesses were made eligible to regular membership therein.

Under §642.04 (2) a group sickness and accident policy may be issued to a single employer, insuring to the extent of the permissive features of Ch. 642, not less than fifteen employees of such employer. The wording of this subsection negatives the idea that such a policy may be issued to two or more employers under a single master policy for the benefit of their respective employees. Such a policy also may be issued to a bona fide association covering not less than fifteen of its members, which association has a constitution and by-laws, has at least twenty-five members, and is organized and maintained in good faith for purposes other than that of obtaining insurance.

From the information at hand, it appears the coverage here was not issued to the state association for the benefit of its members but, in effect, to a group of employer members of such organization for the benefit of their respective employees, (including such employers) as evidenced by the following: (1) Eligibility for coverage depends upon employment and not membership in the association. (2) Not only must such employment relationship exist, but to be eligible there must be "full-time" employment, as defined. (3) The employee's insurance under the plan terminates when the employee leaves the employ of the company which hires him. As above indicated, this coverage does not appear to be permitted by §642.04 (2).

(2) It appears that the association contemplated by §642.04 (2) must be composed of individuals, since no such policy "*may be issued to any employer, as enumerated above, or to any association unless all employees or members of such employer or to any association unless all employees or members of such employer or association, or all of any class or classes thereof, determined by conditions pertaining to their employment, but not determined so as generally to exclude those in the more hazardous employments, are declared eligible and acceptable to the company at the time of issuance of the policy and unless at least sixty per cent of the eligible employees or members are so insured.*" (The underscored part of such quoted matter applies to such an association). It is apparent from the excerpt from the minutes of this organization, mentioned above, that corporations, as well as individuals, are eligible to membership in the association. A corporation may not be insured under any such group policy. Hence, even though in apt wording, the coverage was issued to the association for the benefit of its members, this is not an association contemplated by §642.04 (2).

(3) It is to be noted that under this coverage "full-time employees" include "individual proprietors, partners, officers and managers." Had this coverage been issued solely on the basis of membership in the association, there would have been no occasion for such provision. Since, however, eligibility is made to depend upon an employment relationship, it is to be noted that there is no provision in our laws pertaining to group accident and sickness insurance for the including of employers in the coverage.

(4) The association must be a bona fide one "organized and maintained in good faith for purposes other than that of obtaining insurance." This means that the members thereof must be associated together in good faith for purposes other than to obtain insurance under §642.04 (2). It is to be noted that on or about October 31, 1950, membership in this organization was enlarged to make eligible the *employees* of owners of such businesses who were members. We are informed that on or about such date, this coverage was issued. It is not to be presumed that such employees were made eligible for membership for the primary purpose of obtaining insurance. Nevertheless, the coincidence of these employees being thus made eligible and the issuance of the coverage is such as reasonably to warrant a study by the Insurance Commissioner of the matter and his determination, as result of such study, of whether or not such employees were made members primarily to obtain the insurance here discussed.

(5) It is the obvious purpose and intent of Ch. 642, F.S., that contracts providing health and accident insurance, including group coverage, shall be issued in pursuance of the provisions of said chapter. Section 642.10 provides in effect that failure of a policy of insurance for accident and health to comply as to form with the provisions of the chapter, shall not affect the validity of the contract of the insurer. We are here concerned with substance as distinguished from form. The better rule seems to be that unless in the lawful exercise of the police power a contract is specifically prohibited by law, even though not in conformity with law, it is valid as between the parties. There seems to be

no provision of Ch. 642 declaring such contract as here involved invalid, and therefore, it is construed as valid (See 44 C.J.S., page 1013, §245). It is usual in contracts of this kind that provision is made for termination thereof at the end of any yearly term. It is recommended that the Insurance Commissioner ascertain if this policy may be so terminated by the insurer at the end of the first year's term, and if such can be done that he direct the insurer to terminate the same in pursuance of the contract terms at that time; provided that prior thereto the insurer shall not have obtained a construction in court proceedings, duly instituted, to the effect that the group insurance here furnished does not offend the laws of this state.

REGULATION OF TRADE PRACTICES IN INSURANCE BUSINESS

May 21, 1951—051-131.

EQUITABLE LIFE ASSURANCE SOCIETY—"ASSURED HOME OWNERSHIP PLAN"

QUESTION: Does the "Assured Home Ownership Plan" of the Equitable Life Assurance Society of the United States, described below, violate any insurance law of this state?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

In this opinion, Equitable Life Assurance Society of the United States is referred to as "Society", and "Assured Home Ownership Plan" is referred to as "plan".

It appears from the request for opinion and file attached that the Insurance Commissioner has received the following specific complaints with respect to the operation of this plan in Florida: (1) From an insurance and realty agency, to the effect that the Society is refinancing mortgages which the agency originated and has been servicing for the accounts of others, the agency being informed that the Society's refinancing plan appeals to a good many borrowers "because certain expenses in connection with the refinancing of the mortgage are paid by the insurance company in order to obtain the life insurance business" which is a part of the plan. (2) From an attorney for a Federal Savings and Loan Association, to the effect that certain insurance companies, including the Society, were making loans and issuing insurance policies simultaneously therewith to the borrowers, and that the attorney has been informed that such insurers offer concessions by way of reducing interest rates or lengthening the term of the loan if the borrower purchases life insurance. (3) From a Florida manager of a large life insurer, referring to an opinion of the Attorney General of West Virginia holding the plan violated anti-discrimination statutes of that state.

The plan of the Society is set forth in detail in a memorandum of the Society filed with the Insurance Commissioner, dated December 6, 1950. Without attempting to give full details thereof, for present purposes the following sufficiently describes the plan:

The plan is essentially a lending program of the Society operated to acquire investments for the benefit of the Society's policyholders. The company makes no other form of dwelling loans than

under this plan. Such loans are made in all states, including the District of Columbia, on the same terms and at the same interest rates, and in conformity with non-discriminatory standards for all applicants. Property, only single-family owner-occupied dwellings, must meet standards of location, design and appraisal, the average of such loans approximating \$5,000. The applicant for loan must be a good financial and moral risk. Amount and duration of a particular loan are determined not only by condition of the property but also by the prospective earning power of the borrower. Life insurance, in the amount of the loan, is required, and may be on the Ordinary Life, Limited Pay Life, or Endowment form, and existing insurance of the company may be used. Agents of the Society, licensed to place insurance, are authorized to accept applications for loans, but no agent has the power or authority to promise or offer the applicant a loan. Applications for insurance are processed through regular underwriting channels; and applications for loans are forwarded to the Society's Residential Mortgage Department and there processed exclusively by salaried employees of that office. The applicant is required to pay the first premium for new insurance required; and whether the loan is approved or not, if the applicant is accepted, the insurance issues. If the application for loan is approved, the policy of insurance is assigned; and if the insured thereafter dies prior to the payment of the loan, the mortgage is cancelled and an amount equivalent to all principal payments previously made is returned to the beneficiary.

Prior to the adoption in 1947 of what is now Ch. 643, F. S., §§625.19 and 625.20, F. S., dealt with the subjects of rebates and inducements for insurance, and §635.01 F. S., related to discrimination in the field of life insurance. Chapter 643 regulates trade practices in the insurance business. It is quite likely that in the field of life insurance §643.04 (6), (7) and (8) were intended by the Legislature to cover entirely the subjects of discrimination, rebates and inducements for insurance, and if so, such subsections would effect repeal of by implication the older sections mentioned. *Realty Bond & Share Co. vs. Englar*, 104 Fla. 329, 143 So. 152; *Beasley vs. Coleman*, 136 Fla. 393, 180 So. 625. While it appears that all provisions of §§625.19 and 625.20 are restated, in effect, in this last legislation, some doubt exists that §635.02 was so repealed, and it is treated as existing law.

The last sentence of §635.02 provides: "Nor shall any insurer, or any agent thereof, make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued therein."

Section 643.04 (7) provides, in part, that insurers are prohibited from making or permitting unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or life annuity, or in dividends or other benefits payable thereon, or in any other terms and conditions of the contract.

Section 643.04 (8) (a) in effect, prohibits insurers (except as otherwise expressly provided by law) from "knowingly permitting or offering to make or making any contract of life insurance . . . or agreement as to such contract other than as plainly ex-

pressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow or give, directly or indirectly, as inducements to such insurance . . . any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing, or offering to give, sell or purchase, as inducement to such insurance . . . or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract." Subdivision (b) of this subsection provides certain exceptions to the quoted provisions above, not here relevant.

Two questions derive from the provisions of these statutes in relation to this plan: (1) Does the plan offend the anti-discrimination features of these laws? (2) Does the plan offend the requirement to the effect that the contract of insurance shall set forth all terms and conditions thereof.

It appears that this plan has not been tested in any court of last resort in the United States. At the time of the issuance of the aforesaid memorandum, proceedings involving validity of the plan were pending in the states of Ohio and West Virginia.

Generally, it may be said that were a person induced to take insurance upon the unqualified promise of an agent that the company issuing the policy would grant him a loan, such would offend our laws. See *Western Union Life Ins. Co. vs. Musgrave* (Ariz.) 215 Pac. 536; *Morris vs. Ft. Worth Life Ins. Co.* (Tex.) 200 S. W. 1114; *Cause vs. Security Life Ins. Co.* (Tex.) 207 S. W. 346; *Mogul Produce & Refining Co. vs. Leverson* (Tex.) 265 S. W. 426; *Moser vs. Pantages* (Wash.) 164 P. 768.

The relevant Florida law above mentioned is to prevent discrimination as between the same class. As announced in *Couch on Insurance, Vol. III, §585*: "The object or intent of statutes aimed against discrimination and rebates is that uniform rates shall be established and maintained, so as to secure all personal equality as to burdens imposed, as well as to benefits derived, by preventing discrimination by insurers in favor of individuals of the same class, either as to premiums charged or dividends allowed, or as has been stated, in order that prospective insureds of the same class shall not be unfairly treated or discriminated against by inducements being given to one of such class, which are not available to all therein." To the same general effect, see *Appleman Insurance Law and Practice, Vol. XII, page 47*.

Speaking of its anti-discrimination laws, the Texas Court of Civil Appeals stated in *Morris vs. Ft. Worth Life Ins. Co.*, *supra*: "It is one of the evident purposes of the statutes to prevent discriminations and secret agreements by which certain policyholders may be enabled to secure special favors as a consideration for their contracts of insurance."

Generally, it may be said that the benefit or advantage a person is to receive from a contract is the inducement for making it.

Collins v. Harris, 130 Wash. 394, 227 P. 508; *E. F. Spears & Son v. Winkle*, 186 Ky. 585, 217 S. W. 691. It is assumed without question that the plan here involved is accepted by borrowers because of its advantage in comparison with other financing plans available to them. So viewed, technically the opportunity of the applicant to have the advantage of such a plan is an inducement to him to take out new insurance with the Society, if such new insurance is necessary to meet the requirements of the plan.

On the other hand, it appears from the aforesaid memorandum of the Society that beginning with the approval of the plan by the New York State Insurance Department, since 1909 the plan, subject to minor changes, has been in operation continuously, except for short periods during depressions and temporary withdrawals from the dwelling loan field; that soon after its adoption, the plan was introduced in other states, and at the date of said memorandum was in operation in all states, including the District of Columbia. We are informed on reliable authority that the plan has been used in Florida for quite a number of years and that prior to this time the same has not been questioned seriously.

Attention is now directed to the question of whether the plan offends the requirements of our statutes to the effect that the contract of insurance shall set forth all terms and conditions thereof. It is quite doubtful that the plan involves any element of this prohibition. Further, while the courts are not in accord on the question, the better rule seems to be that unless the law particularly prescribes otherwise, agreements made subsequent to issuance of an insurance policy are not included in the statutory prohibition. For discussion of the matter, see *Couch on Insurance*, Vol. I, pages 285, 286; 32 C. J., §216, page 1118.

The parts of §635.02 and Ch. 643 mentioned above as relevant here are valid police regulations. The legislature has wide discretion in classifying the subjects of police regulation. *Dutton Phosphate Co. vs. Priest*, 67 Fla. 370, 65 So. 282. The legislature may, under police power, suppress evil by prohibiting a stated practice out of which evil largely grows, even though innocent acts may thereby be forbidden and long-established customs made unlawful. *L. Maxcy, Inc. v. Mayo*, 103 Fla. 552, 139 So. 121. But the exercise of that power must reasonably be related to public welfare. *Nelson vs. State*, 84 Fla. 631, 94 So. 680. The state may not, in a police regulation, impose unnecessary or unreasonable restrictions on an owner's use of property. *State vs. DuBose*, 99 Fla. 812, 128 So. 4. And a statute should be so construed and applied as to make it valid and effective, if its language does not exclude such application. *State v. Duval County*, 76 Fla. 180, 79 So. 692; *City of St. Petersburg vs. Seibold*, 48 So. 2d. 291.

Proper investment of funds is a necessary function of the Society. Unless it can be shown that the plan has characteristics opposed to public welfare, lawfully there may be no curtailment of the plan by police regulation. The provisions of our statutes set forth above and relevant to this question were to correct practices opposed to public welfare which are evident from a study of such provisions. It is urged by the Society in said memorandum that primarily the plan is an investment one, non-discriminatory,

and that the required insurance is but an incident of that plan. Accordingly, it is conceded that respectable doubt exists that the plan offends the statutes mentioned.

We are not aided here by any decision of our Supreme Court. It seems quite evident that the questions here presented are controversial ones which only the courts in a proper proceedings can determine with finality.

Until our courts shall rule upon the question of the validity of this plan, in view of the long use of the plan by the Society, and the doubt as expressed above that the plan falls within the purview of the police regulations mentioned, the position is here assumed that the lending of money by the Society in strict conformity with the Society's plan, as set forth in its aforesaid memorandum filed with the Insurance Commissioner, is not violative of the parts of §635.02 and Ch. 643 mentioned above as here relevant or any other statute of this state.

Hence, as conditioned, the question is answered in the negative.

Whether the instances from which derived the specific complaints received by the Insurance Commissioner, referred to above, involved practices of the Society's agents which were not in strict accord with such plan, are matters which cannot be here answered because of lack of detailed information.

SURETIES AND SURETY COMPANIES

July 18, 1952—052-223.

GUARANTEED ARREST BOND CERTIFICATES— DECLARATION OF LIABILITY AS SURETY

QUESTION: Should we accept the "Declaration of Liability as Surety" of the Continental Casualty Company in which they obligate themselves up to the amount of one thousand dollars (\$1,000.00), notwithstanding the fact that in accordance with our statute, F. S., §648.19, they state that, in any event, they limit their liability to two hundred dollars (\$200.00)?

To: Honorable J. Edwin Larson, Insurance Commissioner:

The effect of §648.19, F. S., is to authorize and accept guaranteed arrest bond certificates so that the many tourists in our state who are members of automotive clubs or associations may, in the event that they are arrested for a violation of our motor vehicle laws, post the certificate in lieu of cash bail. This procedure is set up for the convenience of the traveling tourists that have been issued guaranteed arrest bond certificates by the motor clubs or associations who with the surety company have qualified under our laws to become sureties on the certificates.

With this in mind I issued from this office opinion No. 051-420, which outlined the form of the "Declaration of Liability as Surety" which the surety companies should use in qualifying under §648.19, F. S., to become surety on the guaranteed arrest bond certificates.

In the above mentioned opinion, which is attached hereto, one of the surety companies obligated itself to the amount of two

hundred and fifty dollars (\$250.00). This office allowed the company to become surety on its certificates in this state on the authority of the majority rule which is stated in American Jurisprudence, Vol. 50, Suretyship §33, which states in part as follows:

" . . . The liability on statutory undertakings is measured by the terms of the statute, rather than by the wording of the instrument, for the sureties engage with eyes open to such statute . . . An undertaking given in compliance with the requirements of a statute will be deemed not to create a more extensive liability than the statute imposes."

However, upon further consideration of the question it appears to me that when the large volume of tourists come into our state holding these guaranteed arrest bond certificates which obligate the surety in an amount in excess of two hundred dollars (\$200.00), great confusion would arise when these tourists, thinking that their certificates can be deposited in lieu of cash bail exceeding two hundred dollars (\$200.00), are advised by a law enforcement officer that their certificate can only be accepted in lieu of cash bail up to but not exceeding two hundred dollars (\$200.00). This confusion could possibly defeat the purpose of the statute.

Therefore, it is my opinion that to avoid such confusion the motor clubs and sureties should in their guaranteed arrest bond certificates, immediately after stating the amount to which they obligate themselves, add a qualifying statement substantially as follows: "The amount of our liability as stated above is subject to the maximum liability allowed by the statutes of the several states."

A disqualifying feature of the Continental Casualty Company and the Chicago Motor Club's guaranteed arrest bond certificate is that in the certificate, which is set out in their "Declaration of Liability as Surety", they fail to state as required by §648.19, F. S., that both the Chicago Motor Club and the Continental Casualty Company guarantee the appearance of the person whose signature appears on the certificate.

For the reasons set forth above the "Declaration of Liability as Surety" of the Continental Casualty Company should not be accepted.

November 20, 1951—051-420.

INSURANCE—GUARANTEED ARREST BOND CERTIFICATES—FORM OF "UNDERTAKING"

QUESTION: What should be the form of "undertaking" to be prescribed by the Insurance Commissioner for execution by a surety company, to make effective guaranteed arrest bond certificates, issued by an automobile club or association to its members, as described in and contemplated by new §§648.19 and 903.36, F. S., added by Ch. 26897, Laws of 1951?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

In response to such question, in former opinion 051-349 we

recommended such form of "undertaking" to be prescribed by the Insurance Commissioner and to be executed and filed by a surety company with said official.

It is to be noted that in the preparation of said form we were under the impression that guaranteed arrest bond certificates issued by all such automobile clubs or associations uniformly were in the amount of \$200. Hence it was that in the form of "Declaration of Liability as Surety", in paragraph (1) thereof, there was provided space for the insertion only of the names and addresses of automobile clubs or associations. It now appears that we were in error in the mentioned assumption.

National Surety Company has delivered to the Insurance Commissioner for filing an executed form of "Declaration of Liability as Surety" which is identical with such form appearing in opinion 051-349 except as to the feature noted. In its preparation of this form said company has added a third column in paragraph (1) resulting in there being listed not only the names and addresses of certain automobile clubs or associations, but also the amount of guaranteed arrest bond certificates issued by the respective clubs or associations listed. There appear in this executed form the names of fifty-three automobile clubs or associations with addresses in various parts of the United States. As to each of these under the third column mentioned there is listed the amount of the guaranteed arrest bond certificates issued. These amounts vary. Forty-eight appear to issue such certificates in the amount of \$100; three in the amount of \$200; one in the amount of \$25; and one in the amount of \$250. Since the listed automobile clubs or associations and National Surety Company are responsible only to the limit of the amount of such certificates issued to members by said clubs or associations, there exists ambiguity in paragraphs (1) and (2) of the executed form of undertaking of this company. It follows that the wording of paragraph (2) of the form is required to be changed to remove this ambiguity and apparent conflict.

Accordingly, the following form of "Declaration of Liability as Surety" to be prescribed by the Insurance Commissioner and to be executed and filed by a surety company with said official would seem to be permitted by and to comply with the requirements of §648.19:

DECLARATION OF LIABILITY AS SURETY

(Name of Surety Company)

a corporation organized and existing under the laws of the State of _____, and possessed of a valid certificate of authority, or renewal thereof, to engage in the surety business in the State of Florida (hereinafter referred to as "Company"), in compliance with the provisions of Section 648.19, Florida Statutes, added by Chapter 26897, Laws of Florida, Acts of 1951, executes this undertaking, to be filed with the Insurance Commissioner of the State of Florida, whereby it obligates itself as follows:

- (1) The Company, by virtue of a contract heretofore

entered into between it and each automobile club or association, hereinafter named, has agreed that it will guarantee the performance of the obligation set forth and undertaken in guaranteed arrest bond certificates issued by each of said automobile clubs or associations to its members during and for the year 195____, the name and address of each of said automobile clubs or associations and the amount of such guaranteed arrest bond certificates respectively issued by them, being as follows:

Automobile Club or Association	Address	Amount of Guaranteed Arrest Bond Certificate
_____	_____	_____
_____	_____	_____
_____	_____	_____

(2) The company obligates itself to pay any judgment entered in pursuance of forfeiture and enforcement proceedings as prescribed in Section 903.36, Florida Statutes, added by Chapter 26897, Laws of Florida, Acts of 1951, adjudged against any person to whom there has been issued by any of the above named clubs, or associations a guaranteed arrest bond certificate, in an amount not in excess of the sum prescribed in any such certificate (the limit of such sums appearing in said certificates issued by the above-named respective automobile clubs or associations being set forth in preceding paragraph (1) hereof) but in any event not to exceed \$200, and which person, after posting such certificate in lieu of cash bail as a bail bond, under the conditions and circumstances set forth in said Section 903.36, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.

(3) The form of the guaranteed arrest bond certificate herein mentioned and issued by each of said automobile clubs or associations to their respective members is as follows:

(Form of such certificate)

In witness whereof, the Company has caused this instrument to be executed this _____ day of _____, A. D., 1951.

(Name of Company)

By _____
(President)

Attest:

(Secretary)

The form of Declaration of Liability as Surety recommended in opinion 051-349 is changed to the extent that it is at variance with the form above suggested.

October 10, 1951—051-355.

INSURANCE COMMISSIONER—SURETY COMPANY—
RELEASE OF DEPOSIT

QUESTION: Heretofore a domestic insurer obtained from the Insurance Commissioner of Florida a certificate of authority to engage in the fire, casualty and surety insurance business in this state; and to qualify to engage in such surety business delivered to the Insurance Commissioner the \$75,000 deposit required by §648.02, F. S. The insurer has submitted affidavit, executed by its president and its secretary-general manager, that at no time during the insurer's existence has it written or assumed any surety business, and that no claims presently exist or ever existed against the insurer as result of any surety business. The insurer has pending with the Insurance Commissioner application to delete from its certificate of authority the right to engage in the fidelity and surety business; and has requested that said deposit of \$75,000 be released by the Insurance Commissioner and accepted by that official as a voluntary deposit under §626.25, F. S. Properly may the Insurance Commissioner so release the said deposit made with him in pursuance of §648.02, and accept the same as a voluntary deposit under §626.25?

To: *Honorable J. Edwin Larson, Insurance Commissioner:*

A part of §648.02 provides that, "Whenever such company ceases to do business in this state, and has settled up all claims against it as provided in this chapter, and has been released from all the bonds upon which they have been taken as sureties, said bonds shall be delivered up to the proper party on presentation of the Commissioner's receipt for said bonds."

Section 626.25 provides, in effect, that any domestic insurer doing a fire, title or casualty insurance business, may deposit with the Commissioner for the common benefit of all the holders of its policies of insurance, cash or securities of the kinds in which by the laws of the state it is permitted to invest or loan its funds, in such amounts as it may from time to time desire, in addition to all other deposits required by it by the laws of this state, which cash or securities shall be held by the Commissioner in trust for the purposes and objects specified.

If this insurer has never engaged in business as a surety company under Ch. 648, F. S., and obtains from the Insurance Commissioner an amended certificate from which has been deleted authority formerly granted to it to engage in such business, under the above quoted provisions from §648.02, it would appear to be entitled to a return of such \$75,000 deposit made by it. It is recognized that such a deposit constitutes a trust fund in the hands of the Insurance Commissioner for the benefit of creditors of the insurer depositing it, as contemplated by §§648.10 and 648.11, F. S. It is to be noted that Ch. 648 in connection with the release by the Commissioner of such a deposit has no non-claim

proceedings as set forth in §649.06, F.S., relating to release of deposit of a limited surety company.

Thus, this application for return of said deposit presents serious questions concerning the degree of proof to be required by the Commissioner that there are no claims, absolute or contingent, with respect to which said deposit is held in trust, and the extent of liability of the Commissioner in event such a claim should ever arise after release of such deposit. In the absence of court authority to the contrary, ordinary caution dictates the position that even though the Insurance Commissioner acts in good faith and in pursuance of reasonable proof in the release of such a deposit, there remains the possibility under given circumstances that he personally might be liable on a claim for the benefit of which such deposit was held by him.

In view of the foregoing, in my opinion the above question properly is answered:

If the Insurance Commissioner is satisfied that no claim, absolute or contingent, exists which may or might be asserted against said deposit, he is authorized to release said deposit upon issuing to said insurer an amended certificate of authority from which has been deleted such insurer's authority to engage in the surety business as contemplated by Ch. 648; and thereupon to accept said deposit as a voluntary deposit under §626.25.

The above answer is conditioned upon the possibility of the Insurance Commissioner incurring liability under the circumstances stated above. However, this is a domestic insurer. The Insurance Commissioner has access to its books and records; is acquainted with the integrity of the insurer's officers who executed the affidavit above described; and from these sources it would appear that as to this insurer he could satisfy himself so that the chance of any such liability mentioned ever arising would be so remote as to be ignored.

LIMITED SURETY COMPANIES

July 27, 1951—051-240.

LIMITED SURETY COMPANIES—BAIL BONDS

QUESTIONS: (1) Is there a limit on the aggregate amount of obligations, absolute or contingent, for which a limited surety company may be liable at any one time?

(2) Is there a limit on the amount of any bond, agreement, contract of indemnity, guarantee or surety which may be issued or assumed by a limited surety company?

(3) Does any duty devolve upon a sheriff to check upon the financial responsibility of a limited surety company which is surety on a bail bond tendered to such sheriff for approval?

(4) Must a bail bond, on which a limited surety company holding a certificate of authority to engage in business in this state is surety, be accepted and approved without question by the proper officer if otherwise the bond is in due form and not in excess of \$500?

To: Honorable Frank M. Sexton, Sheriff, Gainesville, Alachua County, Florida:

Bail may be given by a fidelity or surety company authorized to act as surety within this state; and any such company may execute the undertaking as surety "by the hand of an officer or attorney authorized thereto by a resolution of its board of directors, a certified copy of which, under its corporate seal, shall be on file with the Clerk of the Circuit Court. Same must be renewed annually." (§903.15, F.S.). Specifically, "Any limited surety company, having a certificate of authority unrevoked, shall be accepted as surety on the bond of any person required by the laws of this state to give such bond, in the event the amount of such bond shall be not more than five hundred dollars . . ." (§§649.10 and 649.12, F.S.).

No limited surety company shall at any time be absolutely or contingently liable as surety or guarantor upon bonds or other obligations in excess of an aggregate sum of ten times the assets of said company. (§649.11, F.S.).

Any bail bond tendered by a defendant must be approved by one of certain named officers, among whom is the sheriff of the county. (§903.34, F.S.).

"X" company, according to report filed with the Insurance Commissioner of Florida, on March 31, 1951, had on deposit with the Insurance Commissioner bonds of the nature required by §649.06, F. S., in the face amount of \$25,000, and in addition thereto had unassigned funds (that is to say, working capital) of \$839.88. This company is possessed of a certificate of authority, or renewal thereof, to engage in business in this state, issued to it according to law by the Insurance Commissioner. The duty of seeing that this company meets the minimum financial requirements set forth in Ch. 649, F.S., dealing with limited surety companies, devolves upon the Insurance Commissioner of this State.

In view of the foregoing, in my opinion the above questions properly are answered as follows:

(1) Lawfully at any one time "X" company shall not be absolutely or contingently liable as surety or guarantor upon bonds or other obligations in excess of an aggregate amount of ten times the assets of the company. For example, conceding that this company's bonds on deposit with the Insurance Commissioner were of the value of \$25,000 on March 31, 1951, on such date the assets of the company appear to have been \$25,839.88, which then fixed the limit of the company's aggregate obligations absolutely or contingently at \$258,398.80. It is, of course, obvious that as the assets of the company change, so this limitation of aggregate obligations also changes.

(2) As indicated above, a limited surety company shall not execute a bond, agreement, contract of indemnity, guarantee or surety for the payment of any sum in excess of \$500.

(3) The Insurance Commissioner of this state is charged with the duty of ascertaining that a limited surety company meets the full minimum financial requirements as set forth in Ch. 649, as prerequisite to the issuance to it of a certificate of authority, or renewal

thereof, and from time to time while such a certificate or renewal thereof is outstanding, to ascertain and require that such minimum financial requirements are met. Thus, when a bail bond upon which a limited surety company, authorized to engage in business is surety, is tendered to a sheriff for his approval, no duty rests upon that officer to inquire into the financial status of the company except to the extent set forth in the answer to the fourth question below.

(4) When such a bond as is contemplated by this question is tendered to a sheriff for approval and he finds that the limited surety company which is surety thereon has executed the same in pursuance of the provisions of §903.15, he should approve the same, subject to the company meeting the requirements set forth in the following sentence. As a condition precedent to approval of such a bond, the sheriff should be satisfied from reasonable proof furnished him by said company that the company at the time such bond is executed by it, is not liable, absolutely or contingently, as surety or guarantor on bonds or other obligations in an aggregate amount in excess of ten times its assets.

August 24, 1951—051-289.

LIMITED SURETY COMPANY—APPEARANCE BOND— VIOLATIONS

QUESTION: A person charged with three criminal offenses was required to post a \$500 appearance bond in each case, a Limited Surety Company, organized and operating under Ch. 649, F.S., executing each of the three \$500 bonds as surety. Is the Limited Surety Company violating §649.10, F.S.?

To: Honorable J. Edwin Larson, Insurance Commissioner:

It is here assumed that the statement of facts above is to the effect that a separate case was filed against the mentioned defendant as to each of such three charges; and this opinion is conditioned upon such assumption.

The features of §649.10 relevant here provide that, "... no limited surety company shall execute a bond, agreement, contract of indemnity, guaranty or surety for the payment of any sum in excess of five hundred dollars. It is the intention of this chapter that no limited surety company shall execute any single obligation which shall require the payment by it of any sum in excess of five hundred dollars." Attention is also directed to the following part of §649.12, F.S.: "Any limited surety company, having a certificate of authority unrevoked, shall be accepted as surety on the bond of any person required by the laws of this state to give such bond, in event the amount of such bond shall be not more than five hundred dollars ..."

In opinion of this office 051-240, dated July 27, 1951, among other things it was stated that, "... a limited surety shall not execute a bond, agreement, contract of indemnity, guaranty or surety for the payment of any sum in excess of \$500." Such determination, of course, is but a restatement of a part of §649.10. It is recognized that the particular situation found here was not dealt with in such former opinion.

Each of the three criminal cases mentioned required an appearance bond. In neither case did the bond executed by the Limited Surety Company as surety exceed the \$500 limit prescribed by §§649.10 and 649.12. Each of such bonds is a separate and distinct obligation. We find nothing in the wording of the mentioned sections or of other provisions of Ch. 649, F.S., which prohibits a Limited Surety Company from executing the three bonds described simply because the same person is defendant in each of the cases mentioned.

In view of the foregoing, in my opinion the question is answered in the negative; that is to say, that in executing the three \$500 bonds under the circumstances set forth in the question, the Limited Surety Company did not violate §§649.10 or 649.12 or any other provision of Ch. 649.

SOCIAL SECURITY FOR PUBLIC EMPLOYEES

May 7, 1952—052-150.

SOCIAL SECURITY ACT—STATE AGENCY—POLITICAL SUBDIVISION—EMPLOYEES' BENEFITS

QUESTION: Does §5 (b) of Ch. 26841, Laws of 1951, preclude the State Agency from approving a plan submitted by a political subdivision pursuant to §5 of Ch. 26841, Laws of 1951, for extending the benefits of Title II of the Social Security Act to its employees, where such plan excludes from coverage any "coverage group", as the latter term is defined in §218, Title II of the Social Security Act?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

Section 5 of Ch. 26841, Laws of 1951, provides that each political subdivision may submit a plan for extending the benefits of the Social Security Act to its employees with the provision that no such plan shall be approved unless:

"(b) it provides that all services which constitute employment as defined in §2 (and) are performed in the employ of the political subdivision by employees thereof, shall be covered by the plan:" ("and" supplied).

The above quoted subsection provides a prerequisite for approval of plans submitted to the State Agency. However, it lacks clarity, which lack is apparently caused by omission of the word "and" as noted. Comparison with the corresponding provision, with reference to agreements between the State and Federal governments, contained in §3 of Ch. 26841 indicates that the "and" was inadvertently omitted. Therefore, in accord with the principle that words may be altered or supplied in a statute so as to give it effect and avoid repugnancy or inconsistency with intention (see *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663), the "and" is supplied for the purpose of this discussion.

It is my opinion that the Legislature in enacting Ch. 26841, Laws of 1951, intended to conform with the Social Security Act in order to secure the extension of benefits to the State provided for in the Social Security Act. We must look, then, to the Social Security

Act to determine whether the subsection in question would preclude approval of the plan in question.

Title 42, §418 (b) (5) USCA (§218, Title II, Social Security Act) defines "coverage group" as follows:

"(5) The term 'coverage group' means (A) employees of the State other than those engaged in performing service in connection with a proprietary function; (B) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function; (C) employees of a State engaged in performing service in connection with a single proprietary function; or (D) employees of a political subdivision of a State engaged in performing service in connection with a single proprietary function."

It is obvious from this definition that the intent of the Social Security Act is that there may be separate "coverage groups" within a political subdivision. The section continues:

"If under the preceding sentence an employee would be included in more than one coverage group by reason of the fact that he performs service in connection with two or more proprietary functions or in connection with both a proprietary function and nonproprietary function, he shall be included in only one such coverage group. The determination of the coverage group in which such employee shall be included shall be made in such manner as may be specified in the agreement."

Thus, it seems that the federal policy is that (1) there may be more than one coverage group within a political subdivision, and (2) that no employee of a political subdivision should be a member of more than one of such coverage groups. Further, it is apparent that the plan under consideration is aimed at conformance with this policy.

Based upon the foregoing, it is my opinion that §5 (b) of Ch. 26841 does not require that the plan submitted be applicable or include all employees of a subdivision before it may be approved. In addition, it may be noted that the section in question provides that in order to be approved, the plan must provide that all "services" constitute employment as defined in Section 2 and are performed in the employ of the political subdivision. It is my construction that this requires that the plan submitted should include all services *performed by the particular employees who are covered by that plan*, which constitutes employment as defined in §2 and are performed in the employ of the political subdivision.

The question is therefore answered in the negative.

July 17, 1952—052-219.

SOCIAL SECURITY—HOUSING AUTHORITY EMPLOYEES— RETIREMENT SYSTEM—TERMINATION

QUESTION: The Housing Authority of the City of Daytona Beach, Florida, has elected to terminate its present retirement sys-

tem in order to qualify its employees for OASI coverage. Is the procedure followed by such housing authority to terminate such retirement system, referred to below, in conformity with applicable constitutional and statutory requirements?

To: Honorable Raymond E. Barnes, Chairman, Florida Industrial Commission:

Attached to the request for opinion is a copy of Resolution No. 333 adopted by said housing authority on June 10, 1952, whereby the retirement system referred to in the question was sought to be terminated.

Under the Florida law there are no requirements as to the termination of the retirement coverage. Of course, there are contractual rights which arise out of the contract with the retirement association, and these rights of interested parties, upon termination of the contract, must be determined by the terms of the contract.

The validity of the housing authority's Resolution No. 333 depends entirely upon the provisions as set out in the by-laws of the retirement association as to the necessary steps to be taken in order to terminate the retirement coverage.

Under Art. VII, §2 (c) of the by-laws of the National Health and Welfare Retirement Association, Inc. it is provided that:

"The status of contributing member may be terminated at the option of the health or welfare agency in question by written notice to the Retirement Association."

It is my opinion that if Resolution No. 333 was duly adopted by the governing body of the housing authority, and written notice of the termination of the retirement coverage has been given the retirement association in accordance with the above by-law, then Resolution No. 333 effectively terminates the retirement coverage of the Housing Authority of the City of Daytona Beach.

July 23, 1952—052-228.

RETIREMENT SYSTEM—TERMINATION—EMPLOYEES —CITY OF FORT MYERS

QUESTION: Does Ordinance No. 388 of the City of Fort Myers, Florida, effectively and in conformance with applicable constitutional and statutory requirements terminate the Retirement System of said City established by Ch. 30, Code of the City of Fort Myers, Florida, 1950 (original Ordinance No. 309), such ordinances of said city being described below?

To: Honorable Raymond E. Barnes, Chairman, Florida Industrial Commission:

Title 42, U.S.C.A. §418 (d), dealing with extended Social Security benefits under the recently amended federal laws, provides in part that, "No agreement with any state may be applicable . . . to any service performed by employees of any coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group." The phrase "retirement system" is defined for the purposes of said §418 as

"... a pension, annuity, retirement or similar fund or system established by a state or by a political subdivision thereof."

Chapter 30 of said code established a comprehensive retirement system, effective January 2, 1948, for described officers and employees of said city. Chapter 30 was originally Ordinance No. 309, and was adopted in pursuance of Ch. 24517, Laws of 1947.

Ordinance No. 388 of said city recites, among other things, that the employees of the City of Fort Myers, Florida, have signed a petition requesting that said retirement system be terminated and that city employees be placed under Federal Social Security; that the Board of Trustees of said retirement system has approved said petition, and that, "the City now desires to take such steps as are necessary to abandon such retirement system and to adopt Federal Social Security"; and such ordinance purports to terminate said system as of May 29, 1952. Section 2 of Ordinance 388 provides that, "The City Clerk shall refund to former city employees who have left city employment their accumulated contributions, or such portions thereof as may be available for refund." Section 3 of said ordinance provides, "That the city take such steps and provide such funds as may be proper and necessary to continue payments and benefits to former employees who have retired and have been and are receiving pensions under said Retirement System at this time;" — and such is the only provision in said ordinance with respect to possible vested rights under said system.

Attention is now directed to rights of city officers and employees under a retirement system of this nature. It is to be noted that funds for payment of benefits under this system derive from payroll deductions and from the city's general fund.

Regardless of possible holdings to the contrary in other jurisdictions, a member of a retirement system of this nature who has not met the minimum requirements of the system prerequisite to receiving benefits thereunder, has no vested rights therein; and as to those members, the Legislature may modify or abolish the system. *State ex rel. Holden vs. City of Tampa*, 119 Fla. 556, 159 So. 292, 98 A. L. R. 501; *Voorhees vs. City of Miami*, 145 Fla. 402, 199 So. 313. On the other hand, a member of a retirement system who has complied with all the terms prerequisite to benefits under the system has a vested interest which may not be abolished without his consent. *State ex rel. Holden vs. City of Tampa, supra*; *State ex rel. Whitehead vs. Ulsch*, 137 Fla. 321, 188 So. 216; *Gay vs. Whitehurst (Fla.)* 44 So. 2d. 430; *State vs. Lee*, 147 Fla. 37, 2 So. 2d. 127, and *Annotations*, 137 A. L. R. 249, *et seq.* The rather late case of *State ex rel. Welch vs. Gay (Fla.)* 41 So. 2d. 893, seems to be of little assistance here.

As above noted, Ch. 30 of said city code was adopted in pursuance of Ch. 24517. Section 4 of such legislative act provides: "That the said City Council shall have the right, power and authority in the exercise of its discretion, to do and perform anything necessary and proper in order to make available to the officers (excepting the Mayor and members of the City Council) and employees of said City, the benefits of Social Security legislation heretofore or hereafter enacted by the Congress of the

United States or Legislature of the State of Florida, to the end that said city's said officers and employees may be placed in the same status under such legislation as the employees of private businesses and industries." At this point it is well to observe that the power of the governing body of the City of Fort Myers to terminate such retirement system once established must derive from Ch. 24517. It is our judgment that under the circumstances here found said chapter grants such power *as to those members of such system who have not obtained vested rights thereunder.*

Relevant rights and benefits under the Retirement System established by Ch. 30 of said City Code, omitting details and qualifying words, are summarized as follows: (1) Right of former city employees to become re-employed with the city within five years of last separation from such service to have restored prior service and membership service. (§12.) (2) Right of employee entering military service to have credit for time in such service if re-employed within one year after termination of military service. (§14.) (3) Voluntary and compulsory retirement with benefits. (§§16, 17.) (4) Member who has attained age of 50, who has had fifteen or more years service with city, and who separates from service of city, may remain member of retirement system for benefits payable upon reaching retirement age. (§19.) (5) Optional joint and last survivorship allowance, and modified joint and last survivorship allowance, involving persons in addition to beneficiaries under system. (Section 20.) (6) Retirement benefits for disability received in line of duty. (§§21, 22 and 23.) (7) Retirement for disability not incurred in line of duty. (§§24, 25 and 26.) (8) Benefits payable for death in line of duty, including accumulated contributions, benefits to children and dependent parents. (§§29 and 30.)

On the basis of the legal principles set forth above herein, the retirement system may be abolished as to officers and employees of the city who are members of the system and who have attained no vested rights thereunder. Further, on the basis of said legal principles, it appears that there is the possibility that members and others who fall in one or the other of the categories set forth in sentences (3) to (8) inclusive, in the preceding paragraph, may have acquired vested rights under the system.

Such grave doubt exists that Ordinance No. 388 is a valid ordinance in its attempt to repeal Ch. 30, Code of 309), setting up "Fort Myers Employees Retirement System," and to terminate and abandon such system, effective as of May 29, 1952, that the position is here assumed that such Ordinance 388 is not valid, for the following reasons:

(1) The right of the City of Fort Myers to create such retirement system derived from Ch. 24517, Laws of Florida, Special Acts of 1947. The authority to terminate such system must derive from power granted for that purpose by the Legislature. As we have held above, §4 of Ch. 24517 authorizes the City Council of said city to terminate such retirement system as to those officers and employees who have acquired no vested rights under the system, in order that such officers and employees may be placed under OASI coverage. We have pointed out in the above opinion that there is the possibility that members of the system and others may

have acquired vested rights under the system by virtue of the provisions of §§16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 29 and 30 of Ch. 30 of said code. There is no authority in Ch. 24517 to abolish the system by repeal of the ordinance creating it as to possible persons who may at this time be entitled to benefits and thus have vested rights under the system. If any such vested rights exist, the nature of such rights must depend upon relevant provisions of Ch. 30 of said code; and until such rights have been satisfied, or holders of such rights have waived same, the system may not be abolished. It is apparent from §3 of Ordinance No. 388 that there are persons holding vested rights in said system. The provisions of §3 of Ordinance No. 388 do not cure the error in, and invalidity of, the ordinance in its attempt to repeal Ch. 30 of the code and abolish the system as to those with vested rights thereunder. Properly, the ordinance could have provided for termination of the retirement system as to those members who have acquired no vested rights therein without repeal of the ordinance establishing the system and termination and abandonment of the system.

(2) Section 2 of Ordinance No. 388 provides for refund to former city employees, who have left city employment, their accumulated contributions or such portions thereof as may be available for refund. If any former employees have vested rights under the system by virtue of the provisions of §19 of Ch. 30 of the code, such employees should be excepted.

(3) The retirement system purports to cover, and we assume it does, officers of the city other than the Mayor and members of the City Council, as well as employees. However, Ordinance No. 388 mentions only employees of the city.

The question is answered in the negative.

October 11, 1951—051-356.

OLD AGE AND SURVIVORS INSURANCE—MUNICIPALITIES —STATE AGENCY—COVERAGE AGREEMENT

QUESTIONS: (1) May a coverage agreement as contemplated in Ch. 26841, Laws of 1951, exclude the services performed for a municipality which may be excluded under the Social Security Act but which are not specifically enumerated as services which may be excluded in said Ch. 26841?

(2) In view of the language of the definition section of Ch. 26841, is it mandatory that a coverage agreement between a municipality and the State Agency include the services performed by all officers of such municipality?

(3) Is it necessary that the State Agency be advised by some official of a municipality that such municipality is authorized under its charter to enter into a coverage agreement with respect to its employees or is such authority granted to all municipalities and other contemplated public agencies in the language of said Ch. 26841?

To: *Honorable Burnis T. Coleman, General Counsel, Florida Industrial Commission:*

To make effective the extended social security benefits now

made available by federal and state legislation (42 U.S.C.A. 417; Ch. 26841, Laws of 1951), agreements must be entered into between the "State Agency" and the state and its political subdivisions desiring to participate in the program, and between the "State Agency" and the federal authority, as conditioned and within the limits prescribed by such legislation.

The federal legislation specifically provides that there shall be excluded from the agreement to be entered into between the federal administration and the state certain described services (42 U.S.C.A., §418 (c) (6) and (d); and permits the exclusion of other services, among which are those set forth in §418 (c) (3). Such agreement shall, if the State requests it, exclude (in case of any coverage group) . . . all services in any class or classes of elective positions . . ."

Attention is directed to certain definitions in §2 of Ch. 26841. "Employee" includes an officer of the state or political subdivision thereof. "Employment", among other things, means certain described services, except "service which under the Social Security Act *may not be included* in an agreement between this state and the Federal Security Administrator entered into under this Act." (Emphasis supplied). These two defined terms, unconditionally include elected officials of the state or political subdivisions; and there is no provision in Ch. 26841 which permits exclusion of such officials in any agreement entered into. Furthermore, §3 of said chapter provides in part that the "State Agency, with the approval of the Governor, is hereby authorized to enter on behalf of the state into an agreement with the Federal Security Administrator, *consistent with the terms and provisions of this Act.*" (Emphasis supplied). By this act, the state has elected not to request exclusion of elected officials in such agreement.

The purpose of Ch. 26841 is to make possible the execution of agreements, as therein contemplated, to make available the extended old age and survivors insurance provided in the federal legislation. Specifically, §5 of the act empowers political subdivisions to submit plans for participation in the extended program.

In view of the foregoing, in my opinion the above questions are answered as follows:

(1) and (2). In view of the language of the definition section of Ch. 26841 and other provisions of that act, a coverage agreement between a municipality and the "State Agency" may not exclude services in any class or classes of elective officials of such municipality under authority of §418 (c) (3), 42 U.S.C.A.

(3) The authority of a municipality to enter into a coverage agreement with respect to its employees, as contemplated by Ch. 26841, is granted by said act. Hence, it is unnecessary that the "State Agency" be advised by an official of the municipality that it is authorized under its charter to enter into such a coverage agreement.

CHAPTER XXXVI
BANKS AND BANKING

NO OPINIONS

CHAPTER XXXVII
BUILDING AND LOAN ASSOCIATIONS

NO OPINIONS

CHAPTER XXXVIII

COMMERCIAL RELATIONS

INTEREST AND USURY

March 17, 1952—052-100.

BONDS—INTEREST COUPONS—INTEREST ON— MATURITY—RATE DETERMINATION

QUESTIONS: 1. Do delinquent interest coupons, detached from municipal or political subdivision bonds, bear interest and if so from what date?

2. If the above question is answered in the affirmative, at what rate do they bear interest in the absence of an agreement fixing the rate?

3. Would a change in the legal rate of interest after the maturity of such coupons but before payment affect the rate of interest on such unpaid coupons?

To: Honorable Bryan Willis, State Auditor:

For the purposes of this opinion we shall assume that there is no contract provision, in either the bond, interest coupon or otherwise, expressing fixing the rate of interest on the interest coupon after maturity.

"It is settled in this state, in accordance with the great weight of authority, that interest is recoverable upon interest coupons after their maturity notwithstanding the absence of a provision therefor in the bonds or coupons" (Panama City v. Fee, Fla., 52 So. 2d. 133, text 135; see also Jefferson County v. Hawkins, Trustee, etc., 23 Fla. 22, 2 So. 362, text 365; National Bank of Jacksonville v. Duval County, 45 Fla. 496, 34 So. 894, text 895; State v. City of Lakeland, 116 Fla. 713, 156 So. 699, text 700; State v. Lee, 116 Fla. 726, 156 So. 744, text 745; Treadway v. Terrell, 117 Fla. 838, 158 So. 512, text 519; and City of Winter Park v. Dunblaine, Inc., 121 Fla. 600, 164 So. 366, text 370). Such interest coupons when detached from the bond, and payable to bearer, "are in legal effect promissory notes and possess all the attributes of negotiable paper" (Trustees Internal Improvement Fund v. Lewis, 34 Fla. 424, 16 So. 325, text 326).

The court in Jefferson County v. Hawkins, 23 Fla. 223, 2 So. 362, text 365, was dealing with past due interest coupons when it posed the question, "What interest should have been allowed on so much of the judgment as embraced past-due interest coupons?" to which it gave the following answer, "Clearly, when it is *not* expressed in the coupon itself that it bears a certain rate of interest after maturity, only the legal rate of interest at the time of maturity can be allowed. This question has been fully decided in the United States Supreme Court in Cromwell v. County of Sac. 96 U. S. 51" 24 L. Ed. 681, text 687 and 688. To the same effect

see *City of Aurora v. West*, 74 U. S. 82, 19 L. Ed. 42, text 50 and authorities therein cited, and annotation in 16 A. L. R. 2d 902.

There is some indication in the record that at least some of the interest coupons involved matured prior to the effective date of Ch. 22745, Laws of 1945 (May 29, 1945) which changed the legal rate of interest in this state, in the absence of an express contract fixing such rate, from eight to six per cent per annum. "If no interest is expressly reserved, or if the instrument expressly provides that it is without interest, after maturity interest may be recovered on the obligation at the legal rate, but such interest *is in the nature of damages* for the detention of the debt, and is not recoverable by virtue of any provision in the contract." (11 C. J. S. 262, §722, 8 C. J. 1096, §1427; and cases cited in the notes). Under some authorities where there is no provision in the contract for interest after maturity, "the contract rate ceases at maturity and thereafter the legal rate *is allowed as damages*." (30 Am. Jur. 29, §37). "Interest allowed, not as a matter of contract but as damages for the breach of a contract, is not within the protection of the constitution and the rate is accordingly subject to change by statute passed after it begins to run." (16 C. J. S. 802, §358; see also 12 Am. Jur. 63, §64). Interest allowed on judgments by statute, being in the nature of damages, is not within the contract provision of the federal constitution (12 Am. Jur. 64, §427; 16 C. J. S. 802, §358). In *Everglades Drainage District v. Forbes Pioneer Boat Line*, 80 Fla. 252, 86 So. 199, text 201, the court said that "it is also settled that constitutional provisions against impairing the obligations of a contract do not apply to obligations imposed by the law without the assent of the party bound, even though by legal fiction they may be enforced in an action in form *ex contractu*."

Under the laws of New York interest upon a promissory note "after maturity, in the absence of other agreement . . . is computed as damages according to the rate then prescribed by law . . . that brings us to the question as to what is the rate of interest prescribed by statute as to the bond and mortgage here involved," there having been an amendment of the statute fixing the rate of interest after the making of the promissory note. The court further remarked that "Unquestionably the statutory rate of interest allowed as damages may be changed during the period between the maturity of an obligation and its payment." (*Metropolitan Savings Bank v. Tuttle*. 290 N. Y. 497, 49 N. E. 2d. 983, 147 A. L. R. 1019, text 1021).

In the light of the above and foregoing observations and authorities the above questions are answered:

1. Delinquent interest coupons, detached from municipal or political subdivision bonds, bear interest from maturity.
2. In the absence of an agreement fixing the rate of interest such interest coupons bear interest at the statutory rate in the nature of damages for breach of the contract to pay money.
3. The obligation to pay interest under the statute

being in the nature of damages, instead of a contract obligation, may be changed by the legislature after maturity and before payment.

Although we have answered the above stated questions, which were posed by your letter, we note from Mr. Fee's letter furnished us, that "a settlement was effected with the plaintiff on the basis of a 10% discount of the total claim for face amount of coupons with interest at the rate of 8% from their due date." If the port authority had power to settle the litigation then the agreement for settlement would seem to be binding so that the rules stated in this opinion in reply to your questions would not seem to be applicable in the instant case.

CHAPTER XXXIX

REAL AND PERSONAL PROPERTY

CROP MORTGAGES

August 7, 1952—052-246.

CHATTEL MORTGAGE BOOK—CROP MORTGAGES RECORDED IN

QUESTION: Should crop mortgages be recorded in the Chattel Mortgage Book or in the Real Estate Mortgage Book?

To: Honorable Stanley C. Burnside, Clerk of Circuit Court, Pasco County, Dade City, Florida:

A growing crop, by the weight of authority is subject to mortgage as a chattel. *Lehman v. Marshall*, 47 Ala. 362. However, a chattel mortgage covering crops, to be effective by recordation, must, as recorded, fully describe the land where the crop is situated. Section 700.01, F. S.; *Weber v. Belle Mead Development Corporation*, 112 Fla. 368, 150 So. 594. It appears that §700.02, F. S., is a mandate to record crop mortgages in the same formality as are recorded mortgages on realty, but not necessarily in the same record books where mortgages on realty are recorded. If a crop mortgage were recorded in the Chattel Mortgage Book, it would still constitute notice to the world; hence, it is my opinion that crop mortgages should be recorded in the book for chattel mortgages.

WRECKED AND DERELICT PROPERTY, GENERALLY

February 28, 1951—051-39.

BOARD OF CONTROL—ABANDONED AUTOMOBILES— BICYCLES—ETC.—DISPOSITION OF

QUESTION: What disposition may be made of automobiles, bicycles and other such property which have been abandoned on the campus of the University?

To: Board of Control:

Efforts should be made to determine ownership by whatever means may be available. Among other methods, as suggested in your letter submitting the inquiry, appropriate advertisement might be placed in the University publications, bulletin boards, etc. If reasonable efforts to discover ownership should fail, the matter should be reported to the County Judge. Procedure for disposition of the property by the County Judge is provided by amended §§705.01 and 705.02, F. S., wherein it is provided that whenever such property is found in a county, the County Judge shall order the Sheriff to take charge and sell the same at public auction, after giving reasonable notice, etc. The County Judge is also authorized to determine the quantum of salvage to be paid to the person finding and reporting the property. Other sections of Ch. 705 provide

the manner in which the Sheriff shall dispose of the remainder of proceeds.

October 16, 1951—051-361.

MOTOR VEHICLES—ABANDONED—TRANSFER OF OWNERSHIP—OPERATION OF LAW

QUESTION: May a Certificate of Title be issued for a motor vehicle upon application where the ownership is based upon proof that the vehicle was purchased at a sale of abandoned property authorized by a municipal ordinance without proof of compliance with the provisions of §705.01, F. S., and to what extent under such circumstances should proof of ownership by operation of law be required?

To: Honorable Arch Livingston, Motor Vehicle Commissioner:

Chapter 705, F. S., governs and prescribes the procedure which must be followed in the disposition of wrecked and derelict goods which may be found in any county of the state. The legal definition of "derelict" as applied to physical property is synonymous with "abandoned". The statute requires that whenever any person shall find wrecked or delinquent property he shall report such finding to the County Judge of the county in which the property is found, who shall order the sheriff of the county to take charge of the property and sell the same in the manner prescribed by the statute, and from the proceeds received from such sale there shall be paid to the person finding the property a sum not to exceed one-half of the proceeds of the sale as salvage. The balance of the proceeds must be held by the sheriff inviolate for the period of one year and one day, and after the expiration of such period shall be, in the absence of legally established claim of the true owner, remitted to the Commissioner of Agriculture to be by him paid into the State Treasury.

It is a well established principle of law that a municipality, without express authority from the Legislature, is without power to enact an ordinance in contravention to a State Statute. The invalidity of such an ordinance is not based upon unconstitutionality but rather upon the ground that it is ultra vires.

Section 319.28, F. S., authorizes the Motor Vehicle Commissioner to issue certificates of title to motor vehicles in cases where the ownership is claimed by operation of law. This section requires, first, the surrender of the outstanding certificate of title previously issued, or, second, if such production is impossible, the presentation of satisfactory proof of ownership and the right of possession of such motor vehicle. In all cases the proof presented must be such as to satisfy the Commissioner of its sufficiency. If in his judgment the proof is not sufficiently clear as to justify the issuance of a certificate, he, in his discretion, may refuse the application of transfer.

Under the circumstances recited in your question, the legality of the municipal ordinance upon which proof of ownership is predicated is fraught with much uncertainty, particularly in that it purports to vest in the municipal officers authority which is vested in state officers by the State Statute, and further to divert the

funds directed by the statute to be deposited in the State Treasury by directing their deposit in the City Treasury. This fact we learn from a study of the ordinance of the city of Coral Gables, upon the validity of which it is understood your question is predicated.

Under the circumstances, the Commissioner is justified in declining to grant application for transfer of ownership upon his records and to issue certificate of title in the name of applicant, except upon surrender of the outstanding certificate of title duly assigned by the registered owner as required by law. This question is accordingly answered in the negative.

CHAPTER XL

STATUTE OF FRAUDS, FRAUDULENT CONVEYANCES AND GENERAL ASSIGNMENTS

NO OPINIONS

CHAPTER XLI
ESTATES OF DECEDENTS

NO OPINIONS

CHAPTER XLII

DOMESTIC RELATIONS

HUSBAND AND WIFE

July 20, 1951—051-227.

MARRIAGE LICENSES—SEROLOGICAL TESTS

QUESTIONS: (1) Miss "X" and Mr. "Y" obtain the premarital serological tests required by §741.051, F.S., on July 1, 1951. Application for marriage license is made on July 29, 1951. Since §741.04 requires a three-day waiting period prior to the issuance of a license, the license cannot be issued until August 2, 1951. Can the county judge issue the marriage license on August 2, without requiring a new blood test, in view of the provisions of §741.051 which requires that the blood test be made "not more than thirty days prior to the date of application for such marriage license"?

(2) Under the provisions of §741.058, F.S., is the period of validity of a marriage license thirty days after issuance thereof, or thirty days after the date of the serological test?

To: *Honorable Robt. H. Wingfield, County Judge, DeLand, Volusia County, Florida:*

In answer to your first question, it seems clear that the county judge could validly issue a marriage license on August 2, under the facts set forth in your question, since §741.051 provides that the serological test shall be made "not more than thirty days prior to the date of *application* for such marriage license." Hence, it appears that the date of application is controlling, rather than the date of issuance of the license. Accordingly, your first question is answered in the affirmative.

As to your second question, §741.058 states that the marriage license "shall be valid only for a period of thirty days after issuance . . ." Hence, the date of issuance of the license is the controlling date, not the date of the blood test.

In summary, then, under the circumstances set forth in your questions, it would appear that although the serological tests were made on July 1, the license could be issued on August 2, provided application was made within thirty days after July 1, and the license issued on August 2 would be valid until thirty days after such date of issuance.

BASTARDY

September 15, 1952—052-271.

PREGNANCY—MARRIAGE PRIOR OR SUBSEQUENT TO BIRTH—BASTARDY PROCEEDINGS

QUESTIONS: (1) A single woman becomes pregnant and

subsequently marries before the birth of the child. Would the child be entitled to support under the Bastardy Act?

(2) A single woman becomes pregnant and subsequently marries after the birth of the child. Would the child be entitled to support under the Bastardy Act?

To: Honorable Robert Taylor, County Solicitor, Dade County, Miami, Florida:

Prior to the enactment of the present Bastardy Act by the 1951 Legislature, §742.01, F. S., provided:

"When any single woman who shall be pregnant or delivered of a child, who by law would be deemed and held a bastard, shall make complaint to the county judge or the justice of the peace . . ." (Emphasis supplied)

This section being repealed in 1951, §742.011, F. S., (Ch. 26949, Laws of 1951) was enacted to take its place. This section provides:

"Any unmarried woman who shall be pregnant or delivered of a bastard child, may bring proceedings in the circuit court in chancery, to determine the paternity of such child." (Emphasis supplied)

(Subsequent sections of the act provide means and methods for compelling the father's support if paternity is properly established.)

In construing the former provision, the Supreme Court, in *Bishop v. State*, 186 So. 413, said:

*"Sec. 5876 (3957), C.G.L., provides that 'When any single woman * * * shall make complaint, to the county judge or the justice of the peace * * *'*

*" * * * Under this statute no one but a single woman may file a complaint of this nature. See C. T. v. State of Florida, 21 Fla. 171; see also Judge of Limestone County Court v. Kerr, 17 Ala. 328; Sword v. Nestor, 3 Dana, Ky., 453; Welch v. Cliburne, 94 Miss. 443, 49 So. 184, 136 Am. St. Rep. 587, 19 Ann. Cas. 388; Gaffery v. Austin, 8 Vt. 70 * * *"*

Although the wording in the former provision has been changed from "single woman" to "unmarried woman," this office does not believe such is sufficient to merit a construction other than that placed on the wording of the former provision by the Supreme Court.

The foregoing seems to definitely settle that a single woman who becomes pregnant and marries before the birth of the child would not be entitled to any relief under the Florida Bastardy Act.

The answer to your second question is not as readily apparent. The precise situation there presented has not been passed on by our Supreme Court. The case of *Bishop v. State*, *supra*, and cases cited therein are strongly suggestive that your question number two would also be answered in the negative, but this would be a

further departure from the common law, on the facts stated, than has heretofore been passed upon by our courts.

November 14, 1951—051-408.

STATE DEPARTMENT PUBLIC WELFARE—CHILDREN
—BASTARDY PROCEEDINGS—LIMITATIONS—
PATERNITY—SUPPORT

QUESTIONS: 1. Did the two-year statute of limitations (\$932.05) apply to prosecutions for bastardy under former Ch. 742, F. S., now repealed by Ch. 26949, Laws of 1951; or

2. Did the three-year statute of limitations apply thereto; or

3. Did any statute of limitations apply to a bastardy proceeding instituted under the provisions of the old law; or

4. Does any statute of limitations apply to a proceeding under Ch. 26949, Laws of 1951?

To: State Department of Public Welfare, Jacksonville, Florida:

Chapter 26949, Laws of 1951, provided a new procedure in chancery to determine the paternity of a bastard child and authorized that court to make appropriate orders for the support of children born out of wedlock, etc. That chapter repealed the former statutory provisions relating to bastardy proceedings. The repealed statute was Ch. 742; the new chancery proceedings will bear the same chapter number.

The questions arise under §12 of Ch. 26937, Laws of 1951, which requires as a condition to receiving State aid that an applicant for aid to a dependent child institute and prosecute action against persons liable for the support of the child.

While our court has on several occasions referred to bastardy proceedings as being quasi-criminal in their inception, they become civil as soon as they reach the circuit court. I do not think that the two-year statute of limitations, \$932.05, applicable to prosecution for criminal offense, applies to bastardy proceedings either under the former statutes or the present statute.

Section 95.11, F. S., which provides the period of limitation for the commencement of most of the different kinds of actions permissible under our practice, reads, in subsection 5, "Within Three Years, — (a) An action upon a liability created by statute, other than a penalty of forfeiture."

Bastardy proceedings are created by statute and, if there is a statutory limitation, the foregoing would be the applicable provision. Neither the former nor the present statute providing for bastardy proceedings includes a limitation upon the action.

In his opinion to you of August 8, your attorney discussed the holdings of various courts on the question of limitations in bastardy proceedings, showing that some courts hold that such statute as that quoted above is applicable, others that it is not. Some hold that no statute is applicable except where the statute on bastardy proceedings itself contains a limitation, etc. As he

pointed out, our court has not ruled on the question. I agree with his conclusion that nothing short of a judicial determination can settle the question in this State. This is true not only because of the wide disagreement among the courts of the other states, but also because of the very peculiar nature of bastardy proceedings in this State, which, under the former statute, started out as a quasi-criminal action and then converted into a civil action; and, under our present statute, the proceedings are in chancery.

However, until our court decides otherwise, it is my opinion that the three-year statute of limitations quoted above would be applicable under the former statute, Ch. 742. It is my further opinion that under the present proceedings in chancery the court would not be bound by the three-year statute but, considering a defense based upon laches, would very likely adhere closely to the above statutory three-year limitation.

What is said above relates to the issue of the paternity of the child only. If, in fact, the paternity of a child has been legally or judicially determined, the parent, in my opinion, could not plead any statute of limitations against an action to require such parent to support the child. In other words, the question of paternity having been determined, there is a continuing duty upon the parent to support the bastard child until its eighteenth birthday, as provided in Ch. 26949, and no statutory limitation would be applicable.

CHAPTER XLIII
TORTS

NO OPINIONS

CHAPTER XLIV

CRIMES

WEAPONS AND FIREARMS

May 7, 1951—051-105.

COUNTY COMMISSIONERS—WEAPONS AND FIREARMS —CARRYING CONCEALED—LICENSES

QUESTIONS: 1. What is the law pertaining to the carrying of firearms?

2. Is it legal for a man to carry a weapon that is not concealed?

3. Is it mandatory that the county commissioners have to issue a permit to carry a gun?

To: *Mr. Louis F. Snedigar, Member, Board of County Commissioners, Dade County, Miami, Florida:*

Your first question is answered by §§790.01, 790.05 and 790.06, F. S., and other portions of Ch. 790.

Section 790.05 would appear to prohibit carrying pistols or repeating rifles without a permit regardless of whether or not it is concealed. However, a person who carries a pistol or repeating rifle in his automobile, for protection while traveling does not violate the law against carrying weapons without a license (*Watson v. Stone*, 148 Fla. 516, 4 So. 2d 700; AGO 1931-32, page 570).

These statutes do not apply, of course, to law enforcement officers. The permits or licenses provided in this chapter are valid only in the county in which the permit is issued and do not entitle the licensee to carry a concealed weapon. They only permit him to carry the weapon openly (AGO 1931-32, page 851).

Section 790.06 which provides the method by which county commissioners may issue a license to carry a pistol or repeating rifle is permissive only and not mandatory. It is entirely discretionary with the county commissioners as to whether or not the applicant (assuming he is over 21 years of age and otherwise qualified under the law) should be given a license to carry a weapon.

October 11, 1951—051-358.

CONCEALED WEAPONS—"COMMON POCKET KNIFE"— ICE PICKS

QUESTIONS: 1. Is a pocket knife with blade that folds into the handle and the blade exceeding three or four inches in length a "common pocket knife" within the meaning of the language of §790.01, F. S.?

2. Is an ice-pick such a weapon as to come within the meaning of the language "other weapon" as the same is used in §790.01, F. S.?

To: Honorable Kenneth E. Cooksey, Acting Prosecuting Attorney,
Monticello, Florida:

Section 790.01, F. S., is the Florida statute which condemns the concealed carrying of certain enumerated weapons and provides punishment therefor and makes an exception as to a common pocket knife.

At the outset, it must be recognized that the concealed carrying of the weapons enumerated in this statute must, to a large extent, be governed by the particular and peculiar facts surrounding each case. It is well known that the trades and occupations of many persons require them to carry and use tools and instruments enumerated in the statute.

Although the Supreme Court of Florida does not appear to have passed on the question, it is generally recognized in other jurisdictions that whether or not certain tools or instruments, carried concealed upon the person, fall within the condemnation of the statute depends, to a large degree, upon whether they are being carried for use as weapons. Ice delivery men are required to carry ice-picks and it would not appear unusual for them to devise a holster for safe carrying, which holster might be concealed or partially concealed. Commercial fishermen are constant users of long, sharp-bladed knives which they might in good faith carry about their persons in such a manner that the knives would be concealed from casual or general observation.

Webster's New International Dictionary, Second Edition, defines pocket knife as "a knife with a blade or blades folding into the handle to fit it for being carried in the pocket"; and this same authority defines jack knife as "a large, strong clasp knife for the pocket; a large pocket knife"; and dirk is defined as "a kind of dagger formerly much used by the Scottish Highlanders; a short sword or dagger worn by British junior naval officers"; and the word dagger is defined "a short weapon used for stabbing. *Dagger* is the general term: cf. poniard, stiletto, bowie knife, dirk, misericord, anlace".

It has been held that an ordinary jack knife with a pointed blade 3 5/16 inches long was not a "dangerous weapon per se", nor was it a "dangerous weapon" within the concealed weapon statute, in the absence of evidence that it was used as a weapon. *People v. Vaines*, 310 Mich. 500, 17 N.W. 2d 729. And this same authority has held that daggers, dirks and stilettos, designed for the purpose of bodily assault or defense are generally recognized as "dangerous weapons per se" within the concealed weapon statute.

It is therefore my opinion that a pocket knife, clasp knife or jack knife with blade approximately four inches long is a "common pocket knife" within the meaning of the exception set out in §790.01, F. S., in the absence of evidence that it was used or was carried for use as a weapon. And it is my further opinion that an ice-pick, such as is commonly used by ice delivery men and in the home, is not included within the language "other weapon" as the same is used in §790.01, F. S., in the absence of evidence that it was used or carried for use as a weapon.

CHILD MOLESTER LAW

December 7, 1951—051-450.

PAROLE COMMISSION POWERS—CHILD MOLESTERS

QUESTIONS: 1. Where an individual is sentenced as provided by §3 (1), Ch. 26843, Laws of 1951, (Ch. 801, F. S.) as distinguished from being committed under §3 (2) of said law, is such person's case one within the jurisdiction of the Florida Parole Commission?

2. Where a person is sentenced under §800.04, F. S., to the state penitentiary and the victim of the assault is 12 years or under, does the Florida Parole Commission have jurisdiction of the Case?

To: *Honorable Raymond B. Marsh, Chairman, Florida Parole Commission:*

Chapter 26843, Laws of 1951, (Ch. 801, F. S.) contemplates three methods of disposing of offenders whose cases fall within its provisions, to-wit: (1) "Sentence said person to the sentence otherwise provided by law", [§3 (1)]; (2) suspend sentence and place the defendant upon probation [§7]; (3) commit such person for treatment and rehabilitation to the appropriate state institution [§3 (2)].

The Parole Commission under Ch. 948 has certain duties and powers where alternative (2) above is effected. Also, in case of alternative (3), your Commission has specified duties to perform under Ch. 26843, Laws of 1951.

Alternative (1) above falls within §3 (1) of the act we are considering. §12 thereof reads:

"Any person who has been sentenced under Section 3 (1) of this Act rather than committed under Section 3 (2) shall not be paroled."

It is not the policy of this office to pass upon the constitutionality of statutes. However, in view of Art. XVI, §32, Florida Constitution, we do wish to call your attention to §3 (1) above, the very language of which attempts to withdraw the authority of the Parole Commission once sentence is pronounced. The pertinent portion of Art. XVI, §32, reads:

"The Legislature may create a Parole Commission empowered to grant paroles or conditional releases or probation under official supervision to prisoners or persons charged with criminal offenses . . ."

Since the legislature has in fact, pursuant to the constitutional amendment, created the Parole Commission, there is a grave question presented as to whether or not it may constitutionally take away the Commissioner's power "to grant paroles or conditional releases or probation * * * to prisoners * * *", where the prisoners are sentenced under §3 (1), Ch. 26843, Laws of 1951. To clarify the duties of the Commission, it may be that it will wish to file proceedings for declaratory decree.

If we assume the act's constitutionality, obviously both questions should be answered in the negative.

KIDNAPPING AND FALSE IMPRISONMENT

March 12, 1952—052-78.

KIDNAPPING—CHILDREN—FATHER AWARDED CUSTODY—MOTHER—ABDUCTION

QUESTION: A man and a woman are the parents of two children—one age 7, one age 9. A divorce decree was entered granting the father a divorce from the mother and the father was given custody of the two children. The mother lives in Philadelphia and came to Miami and made a personal appearance and contested the suit for divorce.

About two or three months after the entry of the divorce decree, the mother went to the public school in Miami Beach, took the children from the school and took them to Philadelphia where she now has them. Did the mother violate §805.01, F. S., relating to false imprisonment and kidnapping?

To: Honorable Robert R. Taylor, County Solicitor, Miami, Florida:

Section 805.01, F. S., provides that: "Whoever without lawful authority . . . confines or inveigles or kidnaps another person, with intent . . . to cause him to be sent out of this state against his will" shall be punished by imprisonment in the state prison not exceeding 10 years.

Your letter implies, but does not expressly state, that the mother took the children without the consent and against the will of the father, and, for the purposes of this opinion, I shall assume that, as a matter of fact, such is the case.

The mother took the children without authority of law, because their custody had been awarded to the father by court order and because the taking was against his will.

Also, it appears from the above recounted facts that the mother inveigled or kidnapped the children with intent to cause them to be sent out of the state, and I am of the opinion that, within the contemplation of the law, she did so against their will.

I quote from 31 Am. Jur. 813, 814, Kidnapping, §6, as follows:

"Whether the crime of kidnapping is committed by the taking or removal of a child by or under the authority of a parent or one in loco parentis usually depends upon whether a decree awarding custody of the child has been granted to one of the parents."

* * * * *

"On the other hand, a parent, or one assisting such parent, commits the crime of kidnapping by taking a child from another to whom its custody has been awarded by a decree of the court."

51 C.J.S. 436-437, Kidnapping, §1-B-6b, says that:

"The offense of kidnapping a child ordinarily exists where there is a seizure or taking against the will of the

person having the right to the custody of such child, and, in order to constitute the offense, the taking or confinement must be against the will of the parents or legal guardian of the victim."

51 C.J.S. 441, Kidnapping, §4, says:

"The offense of kidnapping a child cannot be committed by the person having the right to the custody of such child, such as the father, or the mother, or the guardian of a child. On the other hand, the crime may be committed if a parent takes his child without the consent and against the will of a person to whose custody the child has been committed by the decree of a court of competent jurisdiction."

31 Am. Jur. 815, Kidnapping, §7, says:

"Similarly, a child of tender years is ordinarily regarded as incapable of consenting to its seizure and abduction, and, when taken away from its rightful guardian, must be deemed to have been taken without its consent, as matter of law."

And 51 C.J.S. 436, Kidnapping, §1-B6a, says:

"A child of tender years, is regarded as incapable of consenting to a kidnapping . . ."

In *State v. Hoyle*, (Wash.), 194 P. 976, the court said:

"Kidnapping is not larceny nor robbery. *At common law* it was defined to be the forcible abduction or stealing away of a man, woman, or child from their own country and sending into another. It was treated as an aggravated species of false imprisonment; all the ingredients in the definition of the latter offense being necessarily comprehended in the former, with the additional ingredient of carrying the person detained out of his own country and beyond the protection of its laws. *To constitute the offense, the asportation, or carrying away, must have been against the will and without the consent of the person detained, and without any lawful authority therefor. A child of tender years was regarded as incapable of consenting to its own seizure and abduction, and, when taken away from its rightful guardian, it must be deemed to have been taken away without its consent as a matter of law, and it has been so expressly enacted in some jurisdictions.* 8 R.C.L. p. 296, §319." (Emphasis Supplied).

State v. Farrar, 41 N. H. 53, involved a case where a father was convicted for the forcible seizure and abduction of his small daughter, the custody of whom had been given to the mother by court order. The argument of the attorney for the state, reported along with the court's opinion, shows that:

"The indictment is founded upon §15 of Ch. 227, Comp. Stat. The essential ingredients of the offense are,
(1.) The acts done must be done without lawful authority.
(2.) They must be forcible or secret. (3.) *They must be*

against the will of the subject of the offense. (4.) The acts themselves may be confinement or imprisonment within the State, or carrying or sending out of the State, or seizing, inveigling or kidnapping, with intent to cause to be sent out of the State, or sold or held to service. The offense may be committed by 'any person' against 'any other person', without distinction of age, color or race." (Emphasis supplied).

In holding that the father was properly convicted, the court said:

"But it is said by the respondent that a child of such tender age could have no will or capacity to resist the forcible seizure, confinement and removal from the State, and that therefore she was not within the protection of either clause of the statute. We, however, cannot assent to such position. On the contrary, laws of this character seem to have originated in the especial purpose of furnishing protection to children. And we are disposed to hold that the child was incapable of consent to the seizure and removal, and that, being taken from its lawful custody, it must be deemed to have been taken without its consent as matter of law. It was so held in the case of a child ten years of age in *State v. Rollins*, 8 N. H. 565.

"In the case of children of that age, when they are in the place of their lawful custody they are deemed to be free, but when taken away against the will of their rightful guardians, they are justly regarded as under illegal restraint. So it is held in proceedings on habeas corpus, and such is the law, we think, that governs this case."

Commonwealth v. Nickerson, (Mass.), 5 Allen 518, was a case where Nickerson, at the instance of the mother of a little boy, seized the boy from the custody of the father, who held such custody under court decree. Nickerson's conviction under the first count was affirmed, said count charging that he committed an assault and battery upon the child, Charles A. T. Rice, "... and then and there without any lawful authority and *without the consent and against the will of said Charles* confined and imprisoned him for the space of two hours." (Emphasis supplied). The trial court charged the jury as follows:

"If the defendants, either alone or in company and in concert with others engaged in the same enterprise, entered the school-room, with no previous knowledge, on the part of the child, of their object, purpose or intention, and they or either of them (all being engaged in the common enterprise) seized the child and took him into a carriage with the intent charged in the indictment, that is such a taking by force and against the will of the child as will satisfy the requirements of the statute, although the defendants acted under the direction of the mother of the child, and although the child, as soon as he knew that his seizure was for the purpose of taking him to his mother,

was pleased with it, and was desirous to have the intention carried out."

In commenting on said charge, the appellate court said:

"The only question upon this count arises upon the ruling of the court upon that part of it which alleges that the assault and false imprisonment were committed without the consent and against the will of said C. A. T. Rice.

"The instructions to the jury as to what would constitute a seizing and imprisonment against the will of the party were certainly sufficiently favorable to the defendants, as they would exclude all previous knowledge of their object, or cooperation in forcibly taking the child from the custody and care of his teacher, on the part of the child himself.

"But in our opinion a more stringent ruling upon this point would have furnished no legal ground for exception in matter of law. The party seized and imprisoned was a child of tender years. The legal custody and care of him was in his father. This had been judicially settled in proceedings instituted by the mother, asking for his custody. The adjudication settled the rights of the parties as to the custody of the child, and rendered illegal and criminal any attempt on the part of the mother or agents acting under her to obtain by violence the possession of him.

"Being in the actual custody of his father, whose will alone was to govern as to his place of residence and the selection of a teacher and custodian, this child of nine years of age was incapable of assenting to a forcible removal from the custody of his teacher, and a transfer to other persons forbidden by law to take such custody. He was under illegal restraint, when taken away from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child. This view is in accordance with that taken in the case of *State v. Farrar*, 41 N. H. 53, upon a similar indictment."

I am of the opinion, based upon the above cited authorities, that the facts recounted above show that the mother violated §805.01, F. S.

OFFENSES BY AUCTIONEERS, PUBLIC OFFICERS AND EMPLOYEES

March 14, 1951—051-52.

COUNTY SCHOOL BOARD MEMBER—PURCHASES— APPROVAL OF BILLS

QUESTION: Is it a violation of §839.09, F.S., for a wife who is a member of a School Board, to approve for payment bills for purchases made from a corporation of which her husband is President when she, personally, does not have any stock in said corporation and is not employed by said corporation? In other words, would

she be construed to have an interest directly or indirectly in the business of a corporation under these circumstances?

To: Honorable W. M. Smiley, State Attorney, Bradenton, Florida:

A school board member is not directly or indirectly interested in a corporation within the contemplation of §839.09, F.S., unless such board member has a financial interest in the corporation.

The fact that a woman's husband is financially interested in a corporation does not cause her to have any direct or indirect financial interest in the corporation, as his interest gives her no right to control or participate in the affairs of the corporation in the slightest degree and gives her no right to receive any of the corporation's earnings or assets.

If the Legislature had meant for §839.09 to forbid a county board member to approve bills for goods purchased from a corporation in which her husband or other relative is financially interested, then the Legislature would have said so in the statute.

Your question is properly answered in the negative.

April 5, 1951—051-79.

COUNTY COMMISSIONERS MEMBER—FIRE INSURANCE— PURCHASES—VIOLATIONS

QUESTION: May a board of county commissioners purchase fire insurance upon county property through an insurance agency operated by one of its county commissioners?

To: Honorable Archie Clement, State Attorney, Clearwater, Pinellas County, Florida:

Under the provisions of §839.09, F.S., no county board may "purchase supplies, goods or material for public use from any firm or corporation in which any member of such board is either directly or indirectly interested, nor shall any such board pay for such supplies, goods, or materials so purchased." Any person violating this statute is guilty of a misdemeanor. This statute being a criminal one must be strictly construed (*City of Leesburg v. Ware*, 113 Fla. 760, 153 So. 87).

An examination of the commonly accepted definitions of the words "supplies, goods and materials" in Words and Phrases indicates that insurance cannot be considered to be within the scope of §839.09. The words "supplies," "goods," "materials," and "merchandise" all appear to be used more or less interchangeably to convey the meaning of articles having an "intrinsic value in bulk, weight or measure." See 27 Words and Phrases 80. "'Merchandise,' as used in a charter incorporating a steamboat company for the transportation of 'merchandise,' does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value in bulk, weight, or measure, and which are bought and sold. *Indiana Bond Co. v. Oge*, 54 N. E. 407; *Citizens Bank v. Nantucket Steamboat Co.*, 5 Fed. Cas. 719; 27 Words and Phrases 80.

Shares of stock and bonds may be to some extent analagous to insurance for the purpose of considering the application of §839.09.

The courts are more or less uniform in their decisions on this point. "Shares of stock are not 'goods' within meaning of sales act. Personal Property Law. *Broderick v. Aaron*, 273 N. Y. S. 641, 18 Words and Phrases 527." "Uniform Sales Act held not to apply to sales of bonds; they not being 'goods,' within statutory definition. *Morris F. Fox & Co. vs. Liaman (Wis.)*, 240 N. W. 809, 812, 18 Words and Phrases 523." "Statute forbidding purchase of supplies from firm in which any member of municipal or county board is directly or indirectly interested held not to apply to purchase of bonds by city bond trustees. *City of Leesburg vs. Ware, et al (Fla.)*, 153 So. 87."

From the above and foregoing authorities it is doubted that insurance is to be classified as either supplies, goods or materials within the purview of said §839.09, F.S. This being true we shall examine the general law upon the subject.

In the case of *Stubbs v. Florida State Finance Company*, 118 Fla. 450, 159 So. 527, text 528, it was held that "a public official cannot legally participate in his official capacity in the decision of a question in which he is personally and adversely interested, or as to which he is acting as the agent for another, whose interest is opposed to that of the governmental unit which the official represents, thus causing him to occupy a position where his duty as a public official is in conflict with his personal interest. This principle has many times been recognized by this court and is not only founded upon a wholesome public policy." In this connection see also 67 C. J. S. 406, §116. "No principle of law is better settled than that the same person cannot act for himself and at the same time with respect to the same matter as the agent of another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty and, constituted as humanity is, in the majority of cases duty would be overborne in the struggle." (*Fisher v. Grady*, 131 Fla. 1, 178 So. 852, text 860).

Although, under the above cited authorities, it may be that such a transaction may be against public policy; however, the insurance contract would not appear to be void, but at the most merely voidable on the part of the public. Although such an insurance contract might be against public policy and subject to avoidance by the public or county, until avoided in some legal manner the county would seem to be entitled to enforce the contract as to any loss occurring prior to an actual avoidance of the said contract. The county commissioners of the county would have a legal right to avoid such a contract made in violation of public policy and it seems probable that any taxpayer might also bring a proceeding to avoid such an agreement should the county not bring such a proceeding within a reasonable time.

In the light of the above and foregoing observations we feel that it is not usually a good policy for boards of county commissioners to purchase insurance through agencies operated by any of their members, although such transactions would not appear to be criminal within §839.09, F.S.

May 17, 1951—051-122.

BOARD OF PUBLIC INSTRUCTION MEMBER—SEALED BIDS—VIOLATIONS

QUESTION: I would like to have an opinion or ruling on the

legality of a firm or corporation submitting sealed bids to the Board of Public Instruction when one of their employees is a member of the Board and will not receive any special compensation on a sale which might result from submitting such sealed bid.

To: Honorable Thomas D. Bailey, Superintendent, State Department of Education:

In my opinion \$839.09, F.S., would prohibit the purchase in question since it would appear that an employee of the bidder would have at least an indirect interest in the financial well-being of his employer even though he would not personally receive any direct or immediate compensation as a result of the acceptance of his employer's bid.

GAMBLING

February 1, 1952—052-33.

LOTTERY LAWS—FOOTBALL CONTEST BY MIAMI NEWSPAPER—VIOLATIONS

QUESTION: Whether a football contest put on by a Miami newspaper violated the criminal laws?

To: Honorable Vivion B. Rutherford, Assistant County Solicitor, Miami, Dade County, Florida:

It appears that on October 8, 1951, the newspaper published in its Sunday edition an entry blank in which it listed 20 football games which were thereafter to be played, and offered \$100.00 to the person picking the most results correctly. In case of a tie, provision was made for awarding the prize to that one of the tying contestants who came the nearest to guessing the final score of still another football game. The \$100.00 prize was awarded pursuant to the advertised offer.

The rules of the contest were set out as follows:

"Mark your choices clearly for each game (win, lose or draw). Neatness will count and the decisions of the Contest Editor will be final.

"All coupons must be in the hands of the Football Contest Editor not later than 6 P. M. on Friday. Mailed coupons will be disqualified unless they are in the Contest Editor's hands by this deadline, regardless of the postmark.

"Coupons will be held only two days after winners are announced. Entries may be handwritten or typewritten. You may submit as many blanks as you wish.

"The contestants picking the most results correctly will receive \$100.00. If two or more contestants tie, the contestant most correctly forecasting the final score of the Miami-Kentucky game will receive \$100.00. If two or more still tie after forecasting the Miami-Kentucky score, \$100.00 will be divided equally among them.

"Employees of the newspaper and members of their families are NOT eligible to compete."

As you know, a lottery contains three elements, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

That a prize was to be awarded by this scheme is apparent.

Even though some judgment and skill were involved in forecasting the results of the football games specified in said advertisement, I think that chance predominated over skill, and that the contest was essentially a guessing contest. Where chance predominates over skill, the element of chance which is essential to a lottery is present (34 Am Jur. 649-650, Lotteries, §6; 54 CJS 846-847, Lotteries, §2 b. (2)). And guessing contests are generally held to be lotteries. 54 CJS 857, Lotteries §10 b; 34 Am Jur. 655-656, Lotteries, §12. Therefore, it is my opinion that the said contest contained the requisite element of chance, just as much so, so far as the law is concerned, as if the winner were determined by drawing numbers from a hat.

This leaves only the element of consideration to be dealt with.

In the English case of *Hall v. McWilliams*, 20 Cox C.C., 33, the information charged the publication of a lottery scheme called "Spots". The person informed against was the publisher of a newspaper which was sold at the price of a halfpenny. The scheme was published in certain issues of this newspaper. In the November 29th issue, announcement was made that for a certain period in certain issues of every edition of the newspaper spots of varying sizes and configuration would be printed in various parts of said issues. Some of these spots were winning spots. Said announcement further stated that on December 19th an announcement would appear showing the exact configuration of such spots as were declared winning spots. It was stated in all such issues that the person who cut out from the newspaper and sent to its offices the portion of the paper containing any spot, the facsimile of which had been thus announced as a winning spot, would receive a prize, with the prizes differing for different spots. The defendant contended that there was no consideration for the chance to win a prize; that the halfpenny paid by the purchaser of the newspaper was for the newspaper itself and not for the sale of a chance. The appellate court, King's Bench Division, rejected the contention, holding that the halfpenny bought not only a newspaper and the news contained in it, but also the chance that the purchaser might turn out to be the fortunate possessor of the newspaper with the lucky spot upon it.

United States v. Wallis, 58 Fed. Rep. 942, involved a newspaper scheme for increasing the number of paid up subscriptions to the newspaper. The advertisement said that all paid up subscribers, including delinquents who paid up by a specified date, would receive coupons bearing numbers corresponding to the numbers on tickets which were to be placed in a box. A specified number of tickets were to be drawn from the box by chance, and prizes were to be given to holders of the coupons bearing corresponding numbers. The Federal Court held that the scheme thus advertised was a lottery, even though every person who entered the scheme was to receive the newspaper subscription as well as the chance to win a prize.

In *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532, the proprietor of a newspaper offered as an inducement to subscriptions, and

gratuitously gave to every new subscriber, a ticket entitling him to participate in a distribution of prizes by lot. The Missouri court said that the subscription price entitled the participant to the newspaper and also to a ticket which might draw a prize, and that the scheme was a lottery.

Our own court has discussed the element of consideration in the case of *Little River Theatre Corporation v. State*, 135 Fla. 854; 185 So. 855.

It is seriously doubted that the newspaper involved fully realized it was violating the lottery laws of the state.

Many persons do not understand the technical distinctions outlined above which place certain schemes in the prohibited class. Furthermore, for many years there has been much public tolerance of many similar schemes. Moreover, the public has been mainly alerted to the need for suppressing organized commercial gambling which unquestionably affects public morals and corrupts public officials rather than schemes of the type here considered.

Nevertheless, a great metropolitan newspaper, because of its power to mold public opinion has a most scrupulous duty not to offend either the spirit or the letter of the law. Because of its position in the community, it should be doubly careful not to create examples which can be used by others to excuse their more harmful violations or to justify other schemes for evading law.

Great care must be exercised by public officials to prevent any schemes even though apparently harmless, if violative of law, because of its improper influence and its propensity to cause others to undertake more harmful schemes. Accordingly we suggest that it would be appropriate to warn the newspaper involved of the violation and ask that it desist from this practice in subsequent football seasons. If it refuses to heed the warning, criminal prosecution would be in order.

The above recommendation would seem to be sufficient to correct the situation for the present at least, if no further violations occur.

February 4, 1952—052-34.

ROLFE ARMORED TRUCK SERVICE, INC.—CLUB 86, MIAMI, FLA.—GAMBLING—VIOLATIONS

QUESTION: Whether the following facts show that Rolfe Armored Truck Service, Inc. is properly subject to being charged with operating a gambling house?

To: *Honorable Robert R. Taylor, County Solicitor, Miami, Florida:*

"This Defendant operates an armored truck service and transports money and valuables from place to place as required by its clients. It serves such institutions as banks, the orange bowl, various football games and other activities and businesses where large sums of money or valuables must be safeguarded. As stated before, its trucks and home offices are connected by a two way radio system.

It carries a pick-up policy in the amount of a million dollars, protecting it and its clients from loss by robbery or theft. This policy does not remain in effect for a long period of time at any given location, but contemplates, as I understand it, protection while making its regular pick-ups of money or valuables. The testimony revealed that on the date set forth in the indictment and information, a truck of the Defendant carried large sums of money to the Club 86, which was operated by some of the other Defendants named in the indictment. This truck parked at the premises known as the Club 86, and the Rolfe Armored Truck Service employees manning the truck carried money in and out of the Club 86 as requested by the operators. In other words, if more money was needed inside, it was taken from the truck into the Club 86, if too much money was accumulating inside the Club, it was taken from the Club to the truck and the truck remained there over the period of time necessary to cover the day's or night's operations. I believe the testimony is clear that the employees of Rolfe Armored Truck Service had knowledge that gambling was being conducted in the premises which they served there by some of the other defendants. Due to some doubt as to whether or not the one million dollar policy described above covered this particular type of operation, another policy was taken out covering both the Rolfe Armored Truck Service, Inc., and the Club 86 from loss by robbery or theft

"On the other side of the picture, the testimony reveals that none of the Rolfe Armored Truck Service employees participated in any of the gambling, either for themselves or as employees of any of the Defendants who operated the Club 86. The testimony further reveals that the service which was rendered the Club 86 and some of the other Defendants by this particular defendant was no different from that furnished the various legitimate businesses and sporting events such as those named or described hereinabove. The only exception to this being the fact that the Rolfe Armored Truck Service and the Club 86 secured the additional insurance policy described above."

It appears from these facts that Rolfe Armored Truck Service, Inc. did not actually operate the gambling house. Therefore, the question of whether it is criminally liable depends upon whether it was a principal in the second degree to such operation, that is to say, upon whether it was present, aiding and abetting such operation.

Rolfe Armored Truck Service, Inc. was present through its employees. This leaves for consideration the question of whether it was aiding and abetting the operation of the gambling house.

It appears to me that when the Rolfe employees, acting for the Rolfe corporation, performed the functions outlined in the foregoing statement of facts, said corporation knowingly furnished to the gambling house operators an instrumentality, viz., money and a money handling service, which was an aid to such operators in carrying on their unlawful business.

Money is ordinarily used for lawful purposes, and there is a conflict of authority as to whether one who furnishes an instrumentality which is ordinarily used for lawful purposes, *with knowledge that it is to be used by another for criminal purposes, is criminally responsible*. I quote from 14 Am. Jur. 820, Criminal Law, §74, as follows:

"A difference of opinion prevails as to whether a person who furnishes an instrumentality of a kind which is ordinarily used for lawful purposes with knowledge that it is to be used by another for criminal purposes is criminally responsible. The view has been taken, for example, that persons furnishing a telephone and service to an establishment where betting on horse races is carried on knowing that the telephone will be used for gambling purposes are not chargeable with aiding or being accessories to the offense of keeping a gambling house. On the other hand, persons who furnished material, ordinarily used for legal purposes, with knowledge that such material was to be used for unlawful purposes, such as the unlawful manufacture of liquor under the prohibition laws, have been frequently, but not always, held guilty of aiding and abetting or conspiring to violate the prohibition laws involved."

On this point also see the Annotation in 108 ALR, page 331.

I do not find that the Supreme Court of Florida has passed upon a case like the Rolfe case, but two cases decided by said Court throw some light on the problem at hand.

In *State ex rel. Dooley v. Coleman*, 170 So. 722, the information charged Glick and others with operating a gambling house where people wagered on horse races run at distant points. The information charged that Dooley and Dickson aided Glick and others in the operation of said gambling house by installing telephones and furnishing telephone service whereby information as to the entries and results of horse races run at distant points was transmitted to said gambling house over said telephones and received there by Glick and others, in order to enable Glick and others to operate the place as a gambling house, and that Dooley and Dickson furnished said telephones and telephone service with knowledge that Glick and others were operating the place as a gambling house and were using and intending to use said telephone equipment to aid them in the operation of the gambling house.

The Supreme Court held that this information did not charge Dooley and Dickson with a crime. In one opinion, prepared by Mr. Justice Ellis and concurred in by a majority of the members of the Court, it was said:

"It is not the service which is thus placed at the disposal of the subscriber, but the use which he makes of the service, which constitutes the crime. The subscriber simply has at his hands a device or instrument which he may use in the transmission of messages or information which may be used by the receiver for unlawful purposes.

"It is no violation of the criminal code that information may be transmitted by means of the telephone con-

cerning the results of a horse race or the results of any other trial of skill or endurance on the part of man or beast, but it is the use which persons make of that information which constitutes the violation of law. See *Commonwealth v. Western Union Tel. Co.*, 112 Ky. 355, 67 S. W. 59, 57 L. R. A. 614, 99 Am. St. Rep. 299.

"The information in this case merely charges the petitioners with supplying information which others may use or may not use for unlawful purposes. They are in no wise charged with participation in the management or operation of the gaming place directly, or indirectly with others, but in the last analysis the information merely charges that the petitioners have placed in the hands of certain persons the means of communicating information to others at distant points, which information such other persons may use for the purpose of gaming.

"Section 7110, C.G.L. 1927, *supra*, has no relation to the acts which it is alleged the petitioners committed, and as it does not charge them with participating in the management or control of the gaming house it charges no offense under the laws of the State."

In another opinion prepared by Mr. Justice Whitfield and also concurred in by a majority of the members of the Court, (but not by Mr. Justice Ellis, the author of the opinion quoted from above) it was said:

"One who aids in the commission of a felony is a principal in the second degree and must be actually or constructively present at the commission of the crime; and such presence must be alleged in the indictment or information.

"It is alleged that petitioners aided in the commission of a felony by furnishing telephone facilities knowing they would be used in the unlawful operation of a place for gambling.

"The information does not allege the presence of the alleged aiders or their participation in the commission of the felony; nor is it alleged that such alleged aiders by conspiracy, or because of interest in the maintenance or conduct of the place used for gambling purposes, intended to furnish the telephone facilities so as to aid in maintaining the place for gambling.

"The statutes of the State do not make it unlawful to furnish telephone facilities to those engaged in maintaining a gambling house; and the furnishing of telephone facilities with mere knowledge that they will be used for gambling purposes is not aiding in maintaining a gambling house within the existing statutes."

In *Hagerty v. Coleman*, 182 So. 776, the Supreme Court cited the said Dooley case with approval.

It appears that Dooley and the Rolfe corporation each furnished to a gambling house an instrumentality, innocent in itself,

with knowledge that the gambling house operators intended to use such instrumentalities to aid them in their illegal operations. However, the Rolfe case differs from the Dooley case in that Dooley was not present when the gambling operations were carried on and did nothing more than furnish telephone facilities, while the Rolfe corporation, through its employees, was present while the Club 86 gambling operations were carried on there, and remained there with a parked truck throughout the day's or night's gambling operations, carrying money in and out as requested by the Club 86 operators, and was even covered jointly with the Club 86 by an insurance policy protecting both of them against loss by robbery or theft.

From the above it is not believed the Rolfe Armored Truck Service, Inc., can be properly charged in an information with operating a gambling house as a principal in the first degree, but a charge of aiding and abetting the operation of a gambling house as a principal in the second degree may well be laid.

However, it is our considered judgment that no useful purpose would be served in filing such an information in view of the fact that informations against the actual operators of the gambling house have not been sustained. It is doubted that there is any reasonable hope of obtaining a conviction against aiders and abettors when cases against the actual operators have not prevailed.

I think that you could properly take the position that little can be gained by attempting to prosecute Rolfe Armored Truck Service, Inc. under the said circumstances heretofore arising out of the Club 86 situation, in view of what has resulted in the prosecution of the actual operators, but it is my opinion that if the Rolfe Service should hereafter engage in similar operations in serving gambling houses, there is every good reason to believe that it, along with the actual operators, can be charged with violating our gambling statutes, as an aider and abettor.

February 15, 1952—052-42.

THEATRES—BANK NIGHT—DRAWINGS—PRIZES

QUESTION: Whether a picture show operator may lawfully "give a prize each week on a drawing such as was practiced in the theatres years ago under the name of 'Bank Night'".

"This theatre operator would like to have each person who buys a ticket sign his name and address on a card and drop it in a box, and once each week the names would be drawn out and if the person whose name is drawn at that time is present he receives a prize; if the person is not present the same amount is added to the following week's prize and the same procedure would be followed. This method would be followed each week until such time as the person whose name is called is present. There would be no charge for entry into the drawing but each person buying a ticket would be permitted to sign a card and participate in the drawing if he so desired."

To: *Honorable Phil O'Connell, State Attorney, West Palm Beach, Florida:*

If the scheme outlined by you serves its intended purpose of advertising the theatre and increasing the attendance and profits, it

would be a lottery under authority of *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855.

Without regard to the *Little River Theatre Corporation* case, said scheme would still be a lottery. A scheme in which a merchant sells goods for their fair market value but by way of inducement gives each purchaser a chance to win a prize by chance, is a lottery. (54 CJS 850-851, Lotteries, §4; 34 Am. Jur. 654, Lotteries, §10). And a scheme in which, in order to facilitate the sale of bonds, the purchasers thereof are given chances to win prizes by chance is also a lottery. (54 CJS 857, Lotteries, §10-b; 34 Am. Jur. 658, Lotteries, §15). By the same token, the scheme outlined by you would also be a lottery.

March 27, 1951—051-67.

LOTTERY LAW VIOLATIONS—DRUG STORES—FAMILY NIGHT—AWARDS BY CHANCE

QUESTIONS: 1. There are some stores in this area which have been conducting what is called 'Family Night', and each person entering the store signs a card which has a stub with a corresponding number, which card is deposited in a barrel, and later during the evening there is a drawing of the names from the barrel and prizes are awarded to those whose names are drawn. There is no admission fee but the store remains open all during the time and sales are made by the clerks before, during and after the drawing. Is such a lottery, or against the law?

2. Another plan in operation is as follows: A local citizen who owns several drug stores has been giving away daily the sum of \$10.00 at one of his stores. Any person desiring to be eligible to win the \$10.00 or more, as hereinafter explained, signs at one of the stores a registration card. The card and a detachable stub both bear an identical number which becomes the number of the registrant. All of the stubs are detached and placed in a single receptacle at the main office. From this receptacle a daily drawing is made from all of the stubs and the person whose registration card bears the same number on the stub drawn becomes the winner for that day. Registrants are added continuously. To be eligible to win, a registrant must on the day preceding the drawing have signed his name in a signature book at one of the several stores. If the number drawn is not that of a registrant who signed at one of the stores on the preceding day, the \$10.00 daily prize is added to the prize of the next day and so on, day by day, until the number drawn is that of a signer of the book at one of the stores on the preceding day. No purchase or other financial consideration is required to register at the outset nor to sign the eligibility books each day. No person is required to be present at the drawing. Registrants agree that the name of the winner may be posted. A registration card and circular which is used at these drug stores are enclosed for your information. Is this plan a violation of our Lottery Laws?

To: *Honorable Harvey E. Page, County Judge, Escambia County, Pensacola, Florida:*

It is well settled that there are three elements to a lottery, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

In each of the schemes outlined in the above stated questions, it is clear that prizes are awarded and that the awards are made by chance. That leaves only the question of consideration to be dealt with.

It appears from your statement of the facts that no money or thing of value is paid directly for the right to participate in the drawings described by you. However, the element of consideration may be present within the contemplation of the lottery statute without any direct payment for the right to participate. It was so held in *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855. In that case, the Supreme Court of Florida held that theatre bank night was a lottery even though it was not necessary for a person to buy a theatre ticket or pay anything for the right to participate in the drawings. The court held that the element of consideration which must be present to constitute a lottery, was present because the scheme advertised the theatre, increased the attendance, and materially enhanced the receipts.

It is apparent that each of the schemes outlined by you advertises the stores involved. Your letter does not say so, but it is highly probable that each of said schemes increases the number of people who visit the store or stores involved in such scheme, and increases the business and profits. If such be the case, then I think that the schemes outlined by you are governed by the above cited theatre bank night case; that a consideration is present, consisting of the advertisement of the stores involved, the enhancement of the number of people who visit such stores, and the increase in the business and profits; and that, therefore, said schemes constitute lotteries.

Also, according to a very respectable array of cases decided in other states, another type of sufficient consideration is present in each of the schemes outlined by you. These cases hold that any consideration sufficient to support a contract will suffice as the consideration for a lottery, such as a benefit to the person conducting the scheme or an inconvenience or disadvantage to the promisee (participant). See 54 C. J. S. 848, Lotteries, §2-C (2). If the Supreme Court of Florida should align itself with these authorities, which is not at all improbable, I think that the necessary result would be that said court would hold that each of the schemes outlined by you has the element of consideration because participants are required to suffer the inconvenience and disadvantage of going to a store and signing up as a condition to participating in the drawing.

March 14, 1952—052-85.

GAMBLING LAWS—COIN OPERATED DEVICES—KICKER AND CATCHER MACHINE

STATEMENT and QUESTIONS: The kicker and catcher machine operates as follows: The insertion of a nickel in the slot releases five balls. Twisting to the right the knob on the right hand side of the machine causes one of the balls to be kicked upward. Then the ball falls downward, necessarily striking some of the numerous pins set in the machine. Striking these pins causes the ball to be deflected from the course it would otherwise take. The ball then drops down into some one of six slots. There is a catcher on the

machine, which may be moved by twisting the left knob on the machine to the left or right. If the player gets the catcher under the right slot (the one through which the ball falls) at the right time, the ball is caught in the catcher. If the ball is thus caught, the player uses the left knob to bring the catcher all the way back to the left, and this releases the ball back to the kicker for a free play and at the same time adds 10 to the score. (1) Is it lawful for the owner of such a machine to offer one package of cigarettes to each player making a score of 90 and two packages of cigarettes to each player making a score of 100 during one nickel's worth of play? (2) If said game is a game of skill, would it be governed by AGO No. 051-469, rendered December 19, 1951, which held that under certain prescribed conditions pool room operators may give prizes to persons making the highest scores without violating the gambling laws?

To: Honorable Murray Sams, State Attorney, DeLand, Volusia County, Florida:

AS TO QUESTION ONE

The said Kicker and Catcher is coin operated. It appears to be clear that the outcome of operating it is to some extent dependent upon chance. It dispenses a form of prize or reward, consisting of free plays. Therefore, in my opinion it is unlawful to possess, or permit the operation of, such a machine. (See §§849.15, 849.16 and 205.63, F.S.; *Sinclair v. Benton*, 10 So. 2d 917).

Therefore, your Question One is answered in the negative.

AS TO QUESTION TWO

The said Kicker and Catcher machine is not governed by Attorney General's Opinion No. 051-469, rendered on December 19, 1951. That opinion related to pool, which is not coin operated and is not governed by the statutes cited under Question One, above, which statutes were enacted for the specific purpose of governing coin operated devices. The said Kicker and Catcher is a coin operated device and it is governed by said statutes.

March 19, 1952—052-93.

DRIVE-IN THEATRE—ADMISSION TICKETS—COUPON TICKETS REDEEMABLE—FREE GASOLINE

QUESTION: The operator of a drive-in theatre wishes to issue a coupon ticket with *each* theatre admission ticket sold by him, with such coupon ticket redeemable at a designated service station in the form of free gasoline. Will such a plan violate the gambling laws of Florida?

To: Honorable Joe Dan Trotman, County Judge, Walton County, DeFuniak Springs, Florida:

The facts presented to me do not show that any chance is involved in the proposed plan. If each purchaser of a theatre ticket receives a coupon ticket entitling him to a definite quantity of gasoline, and if every coupon ticket is good for the same amount of gasoline, then I do not think that the plan violates the gambling laws.

June 14, 1951—051-162.

PINBALL MACHINES—FREE PLAYS UNLAWFUL

QUESTION: I have been advised by operators of pinball ma-

chines that it has been ruled legal for these machines to carry "free plays."

As we had these operators remove all "free plays" from the machines, I would like to know whether or not such ruling has been legalized, in order that I may notify the operators accordingly?

To: Honorable John F. Kirk, Sheriff, Palm Beach County, West Palm Beach, Florida:

No such ruling as you inquire about has been made by the Supreme Court or by me. The operators mentioned by you evidently had heard of the Supreme Court's recent close 4 to 3 decision in *Deeb v. Stoutamire*, which held that a coin-operated miniature bowling alley which dispensed free plays was lawful because the outcome depended entirely upon the skill of the player rather than upon an element of chance and unpredictability inherent in the machine itself.

Under the 1937 slot machine law (now §849.15 et seq.), the Supreme Court decided that pinball machines possess the element of chance and unpredictable result which renders them obnoxious to said statutes (*Weathers v. Williams*, 182 So. 764; *Eccles v. Stone*, 183 So. 628). The miniature bowling alley involved in the recent case of *Deeb v. Stoutamire* was held not to possess the inherent element of chance and unpredictability which would make it unlawful, but neither that case nor any other case has in any way weakened the Supreme Court's holding in *Weathers v. Williams* and *Eccles v. Stone* that pinball machines do possess the required element of chance and unpredictability to make them unlawful.

The 1941 Legislature enacted a statute (now §205.63) which, when construed with the slot machine law, requires that a coin-operated machine, in addition to possessing the element of chance and unpredictability, must also dispense some form of prize or reward in order to be unlawful. However, in the case of *Sinclair v. Benton*, 10 So. 2d 917, the Supreme Court of Florida held that a machine dispenses a form of prize or reward if it dispenses free games. That decision has not been overruled or modified.

The only uncertainty injected by the recent close decision in *Deeb v. Stoutamire* is as to whether certain types of coin-operated, free play dispensing machines possess an inherent element of chance and unpredictability. It was to be expected, of course, in view of the decision in the *Deeb* case, that just such a contention would be made as has been made to you with regard to pinball machines. It is interesting to note in *Eccles v. Stone* the Supreme Court of Florida said:

"It is also a matter of common knowledge that pursuant to the passage of that Act (Ch. 18143, Acts of 1937, outlawing slot machines) the popular slot machine with its set of pictured wheels, its alluring jackpot and its pull lever, generally known as the one-armed bandit, faded away from the public places and immediately in the places where they had stood were set up the mechanical horse races, *marble pin games and other coin-operated mechanical devices*, adapted and fit for fast, easy gambling; and it is

a matter of common knowledge, of which we cannot plead ignorance, that these machines are generally used as gambling devices and that the gambling element is the principal lure which causes them to be played by the public."
(Matter in parentheses supplied)

To recapitulate, it seems to us that in order for the conventional type of pinball machine dispensing free games to be declared legal, the Supreme Court must overrule its former decisions in *Weathers v. Williams*, *Eccles v. Stone*, and *Sinclair v. Benton*.

August 2, 1951—051-255.

LOTTERY LAW VIOLATIONS—HOTELS—GUESTS—BINGO—PRIZE AWARDS

QUESTION: Where guests of a hotel play bingo for prizes furnished by the hotel, such as fountain pens and wallets, and where no charge is made to the guests for playing, is this a violation of the gambling laws?

To: Honorable J. T. Landon, State Hotel Commissioner:

It is well settled that there are three elements to a lottery, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

In the transaction outlined in the above stated question, it is clear that prizes are awarded and that the awards are made by chance. This leaves only the question of consideration to be dealt with.

The element of consideration may be present, within the contemplation of the lottery statute, without any direct payment for the right to participate. It was so held in *Little River Theatre Corporation v. State ex rel Hodge*, 185 So. 855. In that case, the Supreme Court of Florida held that theatre bank night was a lottery even though it was not necessary for a person to buy a theatre ticket or pay anything in order to participate in the drawings for prizes. The Court held that the element of consideration, which must be present to constitute a lottery, was present because the scheme advertised the theatre, increased the attendance, and materially enhanced the receipts.

It is apparent that the transaction about which you inquired will advertise the hotel, make it more attractive to prospective guests, act as an inducement for people to patronize the hotel, and increase the receipts. If this were not so, why would the hotel be willing to expend its money to furnish prizes to be played for by guests?

Therefore, I think that the transaction under discussion is governed by the above mentioned theatre bank night case; that a consideration is present, consisting of the advertisement of the hotel involved and the increase in patronage and receipts which result; and that said transaction constitutes a lottery and violates the gambling laws.

There is no difference in principle, only a difference in degree, between a hotel putting up prizes like fountain pens and wallets and putting up large cash prizes. The chief difference is that large

cash prizes would be of greater advertising value and would result in a greater increase in patronage and receipts.

In my opinion, your question is properly answered in the affirmative.

October 8, 1952—052-289.

LOTTERY LAWS—THEATRES—SKY LINE PICTURES— CONTEST—VIOLATIONS

QUESTION: A sky line contest is put on by a theatre. Each week for 20 weeks a theatre patron may, when he purchases an admission ticket, obtain a printed sky line picture taken in some city in the United States. Also, anyone may obtain the picture at the box office without buying a ticket. I infer from the contest rules that a person may enter the contest later, in which event he obtains back pictures from the manager. The person obtaining a picture writes on it the name of the city in which it was taken, together with his name and address. He saves all pictures and answers until he has a complete set of 20 pictures. He must turn them in to the theatre manager not later than one week after the last picture is displayed. If two or more persons name photos correctly, or in case of a tie, judges will determine the winner of the prize, taking into consideration the neatness and overall presentation. Does such a contest violate the gambling laws of Florida?

To: Honorable Robert R. Taylor, County Solicitor, Miami, Florida:

There are three elements in a lottery, viz., (1) a prize, (2) an award by chance, and (3) a consideration.

It is apparent that the element of prize is present in the said Sky Line contest.

It is probable that, if all of the facts were developed, they would show the element of consideration is also present under the holding in *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855, but the facts presented are not comprehensive enough to enable me to definitely determine this point.

However, I do not think that the element of award by chance is present in said contest. There is no lottery unless chance predominates in determining the winner and I do not think that chance predominates in said Sky Line contest. Rather, I am of the opinion that the predominant factor in determining the winner is skill, judgment and education and that, therefore, the contest is not a lottery.

Nor do I think said Sky Line contest violates any other gambling law of Florida.

December 17, 1951—051-459.

LOTTERY—DEFINITION—FREE TICKETS—DRAWINGS— VIOLATIONS

QUESTION: Is a scheme to give away certain property under certain circumstances in violation of the laws of this state, particularly as pertaining to the setting up and operation of a lottery?

To: *Honorable Robert R. Taylor, County Solicitor, Dade County, Miami, Florida:*

You state the facts to be as follows:

"A person goes into the store, writes their name on a ticket with a number thereon and the person registering gets half of the ticket with a number corresponding to the number left on the other half of the ticket in the store, then leaves the store or stays as he sees fit. The store places the stubs with numbers on them in a barrel or box and at regular intervals draws out a number, and the person holding the corresponding number is then given a mattress."

I have been furnished a copy of the ad of the particular store in question and it appears that some of the language carried on this ad is as follows:

"Register Now! Get Free Tickets!"

"Get Your Tickets Now and Register!

No Obligation . . . Nothing To Buy!"

"Mothers! Bring the Kiddies Friday!

Saturday! All children accompanied by their parents . . . will receive a toy balloon on a stick . . . FREE . . ."

"Spring Air—'70 . . . QUALITY luxury Mattress! We are GIVING ONE AWAY FREE . . . on EACH of 5 DAYS AS NOTED AT THE TOP OF THIS ANNOUNCEMENT! Better register—NOW—TODAY! THIS OFFER GOOD AT MIAMI STORE ONLY!"

"REGISTER NOW! You don't have to be present to get an AWARD!"

It is well settled that there are three elements to a lottery, which are, viz.: (1) a prize, (2) an award, and (3) a consideration. In the scheme outlined in your letter, it is clear that prizes are awarded and that the awards are made by chance. That leaves only the question of consideration to be dealt with. It appears from your statement of the facts and from the advertisement appearing in the newspaper that no money or thing of value is paid directly for the right to participate in the drawings described by you, however, the element of consideration may be present within the contemplation of the lottery statute without any direct payment for the right to participate. In discussing the element of consideration, one of the necessary elements in a lottery, our court in the case of *Little River Theatre Corporation v. State*, 135 Fla. 854, 185 So. 855, said:

"The fact that a person is awarded the prize on 'Bank Night' and not buying a ticket to the theater, as we see it, is wholly immaterial. The third essential being a consideration, the facts show that the attendance at the theatre on Bank Night is from two to seven times greater than on the other night when the same picture was shown. Bank Night advertises the theatre, increases the attendance, and the receipts show a material enhance-

ment. When we visualize substance rather than form, the theatre management desired to fill the theatre by the Bank Night method. It is clear that the management of the theatre was not interested in filling the lobby outside of the theatre, or the vacant lots within a radius of two or three blocks, but the sole objective was to increase the attendance upon the theatre by the advertisement of Bank Night and as an incident the revenue of the theatre was increased. We therefore hold that the Bank Night method as disclosed by the admitted statement of facts is a lottery prohibited by the statutes, *supra*."

It is admitted that perhaps there is no intent on the part of the store in the question submitted by you to violate the criminal laws of this state, nevertheless, great care must be exercised by public officials to prevent the use of some scheme that might appear on its face to be a gratuitous distribution of property from being used as a device to evade the law. It is doubted that such a scheme as you have described affects the public morals materially, because, in fact, similar situations have received general public tolerance for years, and the question of legality can only be determined with finality by the courts.

It is apparent, however, that the scheme outlined by you advertises the store involved. While it is not stated it is probable that this scheme also increases the number of people who visit the store and increases the business and profits of such store. If this be the case, then it appears that the proposition outlined by you is governed by the above cited theatre Bank Night case.

It might be that in a proceeding for a declaratory judgment the facts would not justify the court in holding that the element of consideration is present, but from what I have before me, it appears that a consideration is present, consisting of advertisement of the store involved, and the possible increase in the number of people who will visit such store and the material enhancement to the store by means of increase in business and profit. This being true it seems that a preceeding for a declaratory judgment or some other appropriate action should be instituted to determine the question.

December 19, 1951—051-469.

GAMBLING LAWS—POOL ROOM OPERATOR—HIGH SCORE PLAYERS—WEEKLY PRIZE

QUESTION: Is it a violation of the gambling laws for a pool room operator to give a prize at the end of each week to the person whose score at a game of pool played in such operator's establishment during the week is higher than the score made by any other person at a game of pool played there during the week, where the players pay no charge except the price of the games played by them?

To: *Honorable O. Frank Scofield, County Judge, Citrus County, Inverness, Florida:*

For the purposes of this opinion, I shall assume (1) that the operator of the pool hall does not compete for the prize which is

to be awarded and stands no chance to gain it, and (2) that the pool players pay only the fair, customary price of the games played by them and that they pay no other consideration.

The plan outlined above is not a lottery because one of the essential elements of a lottery is lacking, viz., an award by chance. The element of chance which is essential to a lottery is not present where skill predominates over chance or luck. (54 CJS 846-847, Lotteries, §2-b-2; 34 Am. Jur. 649-650, Lotteries, §6). Although there is some chance or luck in the game of pool, it is predominantly a game of skill. (24 Am. Jur. 412, Gaming and Prize Contests, §21; 27 CJ 969, note 20-b-2).

Because of the fact that the pool room operator does not compete for the prize and stands no chance of gaining it back but, if he abides by his offer, he must lose it, there is no "stake, bet or wager" and the said plan is not a violation of §849.14, F. S., which makes it unlawful to stake, bet or wager money or other thing of value upon the result of any trial or contest of skill (*Pompano Horse Club v. State*, 111 So. 801), provided that the sums paid for playing pool are not specifically set aside as the prize but are paid into the operator's general funds and become for the time being a part of his assets, subject only to his obligation to pay out of his funds the amount which he has offered as a prize, regardless of the amounts received from his customers for playing pool (See 24 Am. Jur. 473-474, Gaming and Prize Contests, §100; 38 CJS 81, 82, Gaming, §5).

The said plan does not violate §849.07, F. S., which makes it a criminal offense for the holder of a license to operate a billiard or pool table to permit any person to play billiards, pool or other game upon such table for money or other thing of value, for the reason that the pool players are not playing the operator for anything because he doesn't compete for the prize and can't win it, and for the reason that the players are not playing each other for anything because no player puts up more than the value of the game played by him and he doesn't pay that to another player.

The said plan does not violate either §849.08 or §849.11, F. S., both penalizing gambling at games of chance, because said plan does not involve a game or games of chance. As above pointed out, skill, rather than chance or luck, predominates in pool playing.

Nor does said plan violate any other gambling statute of this state.

I wish it clearly understood that this opinion is not to be construed as approving the legality of a plan of the type outlined above, if (1) the players pay any consideration other than the fair, customary price of the games played by them or (2) if the operator competes for the prize or (3) if the sums received for playing pool are specifically set aside as the prize or (4) unless the prize is to be given without regard to how much or how little is paid to the operator by pool players during the week.

December 21, 1951—051-478.

LOTTERY LAW—VIOLATIONS—DRIVE-IN THEATRES— FREE ADMISSION—PRIZES

QUESTION: Is it unlawful under the lottery laws of Florida

for a drive-in theatre to give away free admission and prizes in this manner: The box office operator will have in her possession the automobile license tag number of several automobiles unknown to the owners of the automobiles. If and when the automobile owner drives into the drive-in theatre the owner of the automobile will receive the above mentioned prizes?

To: Honorable Wilson L. Bailey, State Representative, Calhoun County, Blountstown, Florida:

While our statute does not define a lottery, it is well settled that there are three essential elements of a lottery, to-wit: (1) a prize, (2) chance, and (3) consideration.

That there are prizes involved in this scheme is admitted, consequently it must next be ascertained if the requisite chance and consideration are present.

The element of chance I deem to be present in this factual situation even though there has been a pre-selection of the winning license numbers and thus when the patrons go to the drive-in their numbers either have or have not been chosen, as the case may be. Technically, their ability to "win" and collect a prize has been determined before they start to the show. But this unalterable fact does not preclude the existence of chance in the situation presented, for whether the element of chance is present or not in any particular scheme must be viewed from the standpoint of the participants i.e., the theatre patrons here. (54 C.J.S. 847, Lotteries, §2b-2) As Mr. Justice Holmes said in *Dillingham v. McLaughlin*, 264 U. S. 370, 373; 68 L. ed. 742, "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law." Neither the persons whose license numbers have been chosen nor the persons whose numbers have not been chosen have any way of knowing whether their tag numbers have been selected or not until they go to the theatre and find out, and until they do so both groups undoubtedly consider themselves as having a chance that theirs has been selected.

The word "chance" in speaking of the cause of any event merely signifies men's ignorance of the real and immediate cause. That is, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation. To hold that the necessary element of chance is not present in this situation because the winning tag numbers have already been chosen, though not known, would not only be contrary to the common sense conception of what constitutes a "chance", but would open the door to technical devices, such as a drawing of the winning bolita number before sale of the tickets, to evade the spirit and intent of the laws of Florida forbidding lotteries.

Having decided that there is a chance present in the scheme outlined in your question, it becomes necessary to determine if the required consideration is paid or given for that chance. Our Supreme Court has held, in a case involving the popular "Bank Night" schemes of the depression era, that the consideration essential to constitute a lottery was present where the theatre conducting the "Bank Night" increased its attendance and consequently its receipts and profits; and this even though it was not

necessary for a person to buy a ticket or pay anything in order to be eligible to win, for those who did pay admission were deemed to have furnished the consideration for all. *Little River Theatre Corp. v. State ex rel Hodge*, 135 Fla. 854, 185 So. 855. It seems obvious that the object of the scheme in question is the same as the Bank Night device in the above cited case. And further, that such object will be accomplished or the device will not be continued.

Thus, it seems clear, under the above authority, that if a drive-in patron learns whether his or her license tag number has been selected or not after paying the admission price then the requisite consideration for a lottery is present. On the other hand, if any of said patrons discover whether they have "won" or not immediately upon driving up to the box office and before paying any admission price, then the question of whether a consideration for the chance to participate in the scheme is present becomes debatable, since at the time they pay, the theatre goers know whether they have or have not "won". However, if our Supreme Court were to adopt the rule enunciated by a respectable array of jurisdictions, that any consideration sufficient to support a contract will suffice as the consideration for a lottery i. e. a benefit to the person conducting the scheme or any legal detriment to the participant, then I am of the opinion that even in the last mentioned factual situation a prohibited lottery would exist.

A thorough study of the cases dealing with the question has led us to the following conclusions: that the problem presented by this and similar schemes is to determine whether it is an evasion of the laws or an avoidance of it, and this question is essentially one of fact; that the question whether or not there is a paid consideration for the opportunity to win a prize necessary to constitute a lottery is a question of fact which must be determined from the facts and reasonable deductions and inferences to be drawn in each case, since there can be no question but that if a person wants to give a prize in appreciation of patronage, he should have the right to do so; and finally, as was concluded by our Supreme Court in *Dorman v. Publix-Saenger-Sparks Theatres*, 184 So. 886, after an analysis of authorities on the subject, that the theatre scheme known as "Bank Night" and other similar devices, such as the one here, may be conducted as a lottery, or it may be conducted in such manner that it is not a lottery, according to whether or not something of value is paid for the opportunity to participate.

Therefore, rather than categorically state that the scheme in question is or is not a lottery, notwithstanding that it appears to me to more nearly come within than without the legal principles enumerated by the Supreme Court in the Little River Theatre Corporation case (*supra*), I suggest that the only safe course to follow is to submit the question to the courts for a declaratory judgment. Until such a judgment is rendered, the operators of the drive-in theatre, in my opinion, run a risk of acting illegally in conducting such a device.

November 5, 1952—052-306.

LOTTERY LAWS—SHOE STORE—CHILDREN—REGISTRATION—VOTES—PRIZES

STATEMENT: Children, wishing to be eligible for prizes,

register at the S & S Shoe Store on an official blank provided for that purpose. Thereafter, customers of the S & S Shoe Store may cast ballots for the registered child of their choice on ballots provided for that purpose at the rate of 100 votes for each one dollar of purchase made. No charge is made to the child for registering, but no votes will be counted unless the child for whom they are cast has officially registered. Provision is made for certain bonus votes in addition to those which go with the customer purchase. Prizes consist of a bicycle, radio and various items of toys and sports equipment. At the end of the contest, the registered child with the highest number of votes wins the bicycle, the registered child with the second highest number of votes wins the radio, and so on down, until all prizes are distributed. In case of a tie in votes, duplicate prizes for that possibility are awarded.

To: Honorable Robert R. Taylor, County Solicitor, Dade County, Miami, Florida:

This scheme is a version of the well-known and often-used popularity contest method of promotion and advertising. It contains two of the three elements of lottery: (1) prize, and (2) a consideration. There remains only the question of whether or not the award of a prize is made by the third element necessary to constitute a lottery, to wit: chance.

The great weight of authority is that the ballot or voting method of determining the winner of prizes in contests of this nature is not a determination by chance, within the meaning of the lottery laws. A scheme or promotion similar to the one outlined by you was considered by the Supreme Court of Vermont in the case of *State v. Lindsay*, 2 Atl. (2d) 201, for the purpose of determining whether the scheme offended against the lottery laws of the State of Vermont. We might state here that the laws of that State denouncing lotteries are substantially the same as the law of Florida.

In a well-reasoned opinion which reviewed most of the authorities of the various states of the United States on the subject, the Vermont court reached a conclusion that the distribution of prizes by chance was not present and therefore the scheme did not constitute a lottery. Other decisions which are in line with this are:

Quatsoe v. Eggleston, 42 Ore. 315, 71 Pac. 66; *Commonwealth v. Jenkins*, 159 Ky. 80, 166 S.W. 794; *Brenard Mfg. Co. v. Jessup & Barrat Co.*, 186 Iowa 872, 173 N.W. 101; *Whitman v. Fournier*, 233 Mass. 154, 125 N.E. 303; *Millsaps v. Urban*, 116 Ark. 90, 171 S.W. 1198; *Guy v. Nat'l City Bank*, 24 Ga. App. 281, 100 S.E. 648; *Boston Piano & Music Co. v. Seckinger*, 198 Mich. 312, 164 N.W. 263; *Leonard v. Pennypacker*, 85 N.J.L. 333, 89 Atl. 26, and *Conqueror Trust Co. v. Simmon*, 62 Okla. 252, 162 Pac. 1098.

In the case of *Boston Piano & Music Co. v. Seckinger*, supra, a substantially similar factual situation obtained. However, the evidence in that case indicated that the method of distribution of ballots was so interlaced with fraud, deceit, double-dealing and

trickery, as to be bad in morals and against public policy. The Supreme Court (Michigan), in refusing, for the reasons stated, to enforce a contract arising out of the scheme, specifically held that it was not a lottery.

In the case of *National Thrift Assn. v. Crews*, 241 Pac. 72, the court considered the legality of a scheme wherein certificates were sold at the rate of one dollar per unit. When 25,000 units had been sold, the certificate holders were privileged to meet and vote for a distribution of money in the proportion of one vote for each certificate held. The distribution of money was as follows: \$5,000 to the person holding the highest number of votes; \$500 to the person holding the second highest number of votes; \$50 each to the 30 next highest; \$25 to the next 50 highest; \$10 to the next 100 highest; \$5 to the next 150 highest; \$2 to the next 1,250 highest and \$1 each to the next 2,500 highest. Under this scheme, 2,500 people got their money back; 1,582 received something in excess of what they paid and the balance, 20,918, did not receive anything.

For the total \$25,000 paid in, \$15,000 was distributed in prizes and \$10,000 remained with the promoter as profit. The scheme was not conducted in connection with any legitimate business or for promoting or advertising any such business. The Supreme Court of Oregon said that it was in the nature of a lottery and was a cleverly designed scheme to evade the law against lotteries. The court distinguished these particular facts from those which it had approved in the leading case of *Quatsoe v. Eggleston*, *supra*.

It is, therefore, my opinion that the advertising and promotional scheme contemplated by the S & S Shoe Store, as outlined in the advertising matter which you have furnished to me, if conducted fairly and honestly, and in strict compliance with the published and advertised rules, is not a lottery within the meaning of the laws and Constitution of the State of Florida.

December 12, 1952—052-325.

LOTTERY LAW VIOLATIONS—APPRECIATION DAY— FREE COUPONS

STATEMENT: The National Trades Day Association of Weatherford, Texas, during past years has regularly sold to retail merchant groups of communities in many states a plan for trade expansion, which includes advertising, the services of a trade counselor, and drawings for prizes on "Appreciation Day." This plan, as now modified concerning coupons, is as follows:

To place in each member merchant's establishment a container containing a thoroughly mixed quantity of coupons. No coupon shall be punched or marked so as to reflect any information as to any customer's purchase, or so as to indicate whether drawn out by a customer or non-customer, or so as to reflect in any way any distinction between customers and non-customers.

Anyone then entering the establishment, whether a customer or a non-customer would be invited to reach into the container and select for himself a coupon, draw it out and write his name and address on the reverse side.

Said coupon may be of the same value or varying values indicated by a percentage printed on the coupon. The first public approach is by the distribution of thousands of printed announcements in the trade territory with thousands of these coupons, all free. In addition, coupons may be freely had for the asking at the office of the sponsoring organization and in the places of business of the participating merchants. It is not necessary to make a purchase in order to secure a coupon. This is explained on the initial printed announcement, in these words: "Attached to this folder you will find a Treasure Chest coupon. You may secure others upon request at any time or at the office of the sponsor. Coupons will be offered to all present at the weekly Appreciation Day program. They are free!"

Although the winner is required to be in town at the time of the drawing, he is not required to be in any particular place of profit or in the building of any particular merchant. The weekly drawings are in the most public spots in the community, such as the city park or square or on a street roped off in the business section. Just before each drawing a public announcement is made offering anyone who does not have a coupon in the container the opportunity to get one, sign his name on the back and deposit it in the container for the drawing, free of charge.

Undrawn coupons remain in the treasure chest indefinitely for future drawings unless the number becomes too great to be handled, in which event one-half of the old coupons are destroyed in the presence of the public at a drawing.

For the drawings, there is no distinction made between coupons distributed freely with the announcement folders, coupons distributed freely from the sponsor's office, coupons obtained freely by being drawn out by customers or non-customers from a container in the establishment of a member merchant and coupons given freely to the members of the audience attending the drawing who do not have a coupon in the container for the drawing.

All prizes, fees, and expenses are paid by the participating merchants, as set forth in a contract signed in the beginning and long before any drawings take place.

Under the plan of operation, both customers and non-customers have equal opportunity to obtain free coupons. No payment of any consideration is either made or promised for any coupon. In the establishment of each member merchant, a sign will be placed near the container in plain view stating clearly that all persons entering the establishment are invited to reach into the container and select for himself a coupon, draw it out and write his name and address on the reverse side and turn it in at the time and place of the drawing, when announced.

To: Honorable Euless Watford, Mayor of Chipley, Chipley, Florida:

It is almost universally held that a lottery is composed of three elements: (1) a prize, distributed by (2) chance, for a (3) consideration. It is perfectly clear also that the above outlined scheme contains the first two elements of a lottery, namely, a prize distributed by chance. Whether or not the necessary element of consideration is also present is a more difficult matter to determine.

Long ago, our Supreme Court held that the element of consideration was present in the Bank Night scheme, conducted by theatres, even though many of the participants who had a chance to win the Bank Night prizes were not patrons of the theatre and had paid no consideration for their chance, and even though there was no requirement that any particular participant or participants should pay a consideration either in the form of admission to the theatre at the time of the drawing or otherwise (*Little River Theatre v. State*, 185 So. 855).

The Court held, on the statement of facts presented in the above case, that it was evident that the patronage of the theatre was greatly increased on the nights when the drawing was held and that many of the patrons who attended and paid admission on Bank Night did so solely for the purpose of being present at the drawing and within easy and comfortable distance to claim the award if their names were called. It was held that the payment of a valuable consideration by a part of the participants was sufficient to condemn the scheme as a lottery even though many other participants paid nothing.

In a previous case, *Dorman v. Sparks Theatres*, 184 So. 886, our Supreme Court had occasion to discuss the type of consideration which must be present in order to condemn a scheme as a lottery. The Supreme Court of Florida reviewed many authorities on the subject and cited with approval those authorities which hold that the consideration contemplated by the lottery laws must be a "valuable consideration" and not merely the "legal detriment" which is sufficient consideration to support a legal contract. In this case, our Supreme Court quoted with approval from the Supreme Court of New Hampshire in the case of *State v. Eames*, 87 N. H. 477, 183 Atl. 590, as follows:

"The problem presented by 'Bank Night' and similar schemes is to determine whether it is an evasion of the statute or an avoidance of it, and this question is essentially one of fact. In answering this question, we do not propose to close our eyes to reality. The test by which to determine the answer to this question is not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation. If, as the state contends in its brief, although this contention does not appear to be borne out by the agreed facts, 'the great majority of people pay for such privilege,' then it is an evasion and as such is not to be countenanced. As we understand the actual situation of this case, however, free participation is a reality. If this is so, then, regardless of the motive which induced the defendant to give such free participation, the scheme is not within the ban of the statute. Violation is shown only when, regardless of the subtlety of the device employed, the state can prove that, as a matter of fact, the scheme in actual operation results in the payment, in the great majority of cases, of something of value for the opportunity to participate.'"

The "Appreciation Day" scheme, outlined above, is materially different in its operation from the Bank Night scheme which our

Supreme Court has previously condemned as a lottery. The drawing is not held in any place of business or profit where the owner or operator would financially benefit from a large group of participants being attracted to his place of business at a particular time. Tickets are not only freely available from the merchants participating in "Appreciation Day," but are also available at other times and places and from other sources and also available at the time immediately prior to the drawing, held in a public place, unconnected with any business or enterprise for profit.

While it is true that a non-customer might be attracted into the business establishment of a participating merchant for the purpose of securing a free ticket and might, while there, be induced to make a purchase, and, conversely, a customer of a participating merchant might, while in the business establishment of a participating merchant on business, avail himself of the opportunity to obtain a free ticket, these instances would not establish a valuable consideration, flowing from the ticketholder to the operator of the scheme, especially in view of the fact that free tickets are available to all persons at places other than the establishment of participating merchants. As indicated in the quotations from the Supreme Court of Florida, the test seems to be whether free participation is a reality. It is not the purpose of the lottery law to strangle and prohibit all business promotional schemes wherein prizes are distributed by chance, but only those schemes in which a valuable consideration is paid by the participants, individually or collectively, for the chance to win a prize. As was said by our Supreme Court in the Dorman case, *supra*:

"(5) So it appears by the weight of authority in this country that the scheme known as 'Bank Night' may be conducted as a lottery or it may be conducted in such manner that it is not a lottery."

In the Little River Theatre case, *supra*, the Court held that the admitted facts showed a valuable consideration moving from the participants to the theatre company so as to constitute that particular Bank Night scheme a lottery. The Court referred to its decision in the Dorman case, *supra*, but did not modify or rescind any of the language of the Dorman opinion.

It is my opinion, from the facts presented to me, that in the "Appreciation Day" scheme, outlined above, free participation is a reality and the element of consideration is lacking. There being no valuable consideration, the scheme does not constitute a lottery. I know of no other gambling laws of the State of Florida which are offended by this scheme.

The conclusion reached above is dependent upon the particular facts presented with respect to the method of operation of this scheme. It should not be construed as an approval of other schemes of a similar nature which might materially vary in the method of operation.

DRUNKENNESS; VAGRANCY; DESERTION

October 2, 1951—051-342.

ARRESTS—CONVICTIONS—COMMON AND HABITUAL "DRUNKARDS"—VAGRANTS

QUESTION: If a person is tried and convicted on January 1,

1951, for being a common and habitual drunkard under §856.02, F. S., and is sentenced to serve a term in the County Jail, and is again arrested within two or three days after his release from having served said term and charged with the same said offense of being a common and habitual drunkard, can the State of Florida introduce the same evidence of prior acts of drunkenness that were used in obtaining the first conviction on January 1, 1951, or are the prior acts of drunkenness upon which the first conviction was based *res adjudicata*? In other words, after a person has served his sentence for one conviction of being a common drunk, does it necessarily follow that he should be given some time to mend his ways and redeem and reform himself after his release from prison before he could be a common drunkard again?

To: Honorable William T. Harvey, Judge, Criminal Court of Record, Jacksonville, Florida:

Section 856.02, F. S., provides that certain persons, among them "common drunkards", shall be deemed vagrants and shall be punished as provided in §856.03.

In order to be a common drunkard, one must be a habitual drunkard (28 C.J.S. 562, "Drunkards", §14-b).

I think that the crime of being a vagrant by reason of being a common drunkard is a continuing offense and that, when a defendant was convicted and sentenced for that offense on January 1, 1951, the book was closed on that offense and evidence of the acts of drunkenness which was used to establish that offense cannot be used against the defendant in a prosecution for subsequently being a vagrant by reason of being a common drunkard. To use such evidence in such subsequent prosecution would, in my opinion, smack of double jeopardy. The defendant has already paid the penalty for the common (habitual) drunkenness for which he was convicted on January 1, 1951, and he should not thereafter be tried for subsequently being a common (habitual) drunkard except upon proof that he was habitually drunk after the acts of drunkenness established in the first case.

VIOLETIONS OF CERTAIN COMMERCIAL RESTRICTIONS

March 14, 1952—052-84.

SECRETARY OF STATE—FOREIGN PARTNERSHIPS— QUALIFICATION

QUESTION: Are there any provisions in the Florida Law requiring general partnerships, formed under the laws of other states, to qualify with the Secretary of State of the State of Florida?

To: Honorable R. A. Gray, Secretary of State:

There are provisions in the general law which would affect general partnerships formed under the laws of other states. For example, a partnership having a name or group of names, other than the names of the persons making up the partnership would be required to register the fictitious name pursuant to §865.09, F. S. Other general provisions of law such as licenses required

for various types of business, etc. would of course be applicable also.

Research, however, reveals no provision in the general law which would seem to require foreign partnerships to qualify with the Secretary of State.

The question is therefore properly answered in the negative.

October 24, 1951—051-380.

FICTITIOUS NAME—TAX DEED APPLICATIONS—TAX SALES CERTIFICATES—PURCHASES

QUESTIONS: 1. May the county tax collector sell delinquent taxes, and issue tax sale certificates, to persons, firms or corporations operating under fictitious names?

2. May the clerks of the circuit courts sell and assign tax sale certificates to persons, firms or corporations under fictitious names?

3. May the clerks of the circuit courts accept applications for tax deeds when the title of the applicant to the tax sale certificates forming the basis for the application are held under a fictitious name or names?

4. May the clerks of the circuit courts receive applications for tax deeds from persons, firms and corporations operating under fictitious names?

To: Honorable C. M. Gay, State Comptroller:

"In general, in the absence of statutory prohibition, judicial inhibition, or fraud, a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his name, by which he may become known, transact business, execute valid and binding contracts, and carry on his affairs." (65 C. J. S. 9, §9; 38 Am. Jur. 601, §13). In a number of jurisdictions the right to use an assumed or fictitious name is restricted by statute (65 C. J. S. 11, §9). "The object or purpose of statutes which regulate the doing of business under a fictitious or assumed name . . . is, in general, to protect the public, to give them information as to the persons with whom they deal, and to afford protection against fraud and deceit." (38 Am. Jur. 603, §14). The consequence of the failure to comply with a statute relating to fictitious names depends upon the terms and conditions of the particular statute (65 C. J. S. 14, §9). A deed made to a person under an assumed or fictitious name has usually been held valid (16 Am. Jur. 482, §75) while on the other hand a deed made to a non-existent person or a fictitious person has usually been held invalid (16 Am. Jur. 478, §68).

Under §865.09, F. S., as amended by Ch. 26760, Laws of 1951, it is made unlawful for any person, firm, partnership or other group of persons (evidently excluding corporations) to engage in business in this state under a fictitious name "unless said fictitious name shall be registered with the clerk of the Circuit court . . ." as required by said section as amended. "The penalty for failure to comply with this law shall be that neither the business

nor the members nor those interested in doing such business may defend or maintain suit in any court of this state, either as plaintiff or as defendant, until this law is complied with, and further that any person violating this law may have information filed against him . . . and charged with a misdemeanor." §865.09, (5), F. S. We find nothing in the statute declaring any property acquired through doing business under an assumed name illegally obtained to such an extent as to defeat title thereto. The penalty prescribed seems to be disqualification to resort to court action, and a criminal penalty in the form of a misdemeanor charge.

In the light of these observations, we find nothing in the statutes or laws of this state which seems to prevent the purchase and assignment of tax sale certificates in an assumed or fictitious name nor do we find anything in said statutes and laws which would prohibit such a holder of tax sale certificates from making application to the clerk of the circuit court for a tax deed sale. These observations seem to answer each of the above questions in the affirmative.

As a practical matter, although a person may be authorized to obtain a tax certificate, or even a tax deed under a fictitious name, there is a possibility that should the same become involved in litigation that he would not be able to defend any such litigation, or bring litigation concerning the title, by reason of the provisions of §865.09, F. S., above mentioned. This fact does not seem to go to the legal questions involved but is merely a practical question to be determined by the person electing to operate under a fictitious name.

December 19, 1951—051-472.

CORPORATIONS—APARTMENT HOUSES—FICTITIOUS NAME STATUTE—REGISTRATION

QUESTION: 1. May the clerk of the circuit court record trade names of corporations which differ from the corporate name of such corporation under the fictitious name statute (§865.09, F. S.)?

2. If the clerk of the circuit court accepts for registration under the fictitious name statute a trade name operated by a corporation, must the affidavit be signed by "all interested persons," as called for in §865.09 (3)?

3. Must apartment houses, including one or two unit apartment houses, register under the fictitious name statute as constituting a "business" as therein defined?

To: *Honorable Ted Cabot, Clerk of the Circuit Court, Broward County, Ft. Lauderdale, Florida:*

Your first question was answered in my opinion 050-379 (see 1949-50 Biennial Report, page 588), wherein I held that a corporation which operates a business under a name other than its incorporated name is required to register such fictitious name with the clerk of the circuit court pursuant to §865.09, F.S. I reaffirm that opinion, a copy of which is enclosed for your information.

As to question two, §865.09 (3), F. S., requires that the affidavit therein described must be signed by "all interested persons." It is my opinion, however, that the signatures of the officers of the corporation would constitute sufficient compliance with this requirement within the meaning and intent of this statute in so far as corporations are concerned, inasmuch as the corporate officers are empowered to act for the stockholders. It would in many cases create an unreasonable requirement if it were necessary to obtain signatures of all stockholders in a sizeable corporation. Your second question is answered accordingly.

In response to your third question, it is pointed out that fictitious name statutes are intended for the protection of those engaged in commercial transactions with businesses conducted under an assumed or fictitious name. Their purpose is to protect those dealing with a person or firm doing business under a fictitious name, in order to enable them to know with whom they deal or do business, and where such acts provide a penalty, to punish those who violate such statutes. See 65 C.J.S. 12, 13.

It would seem that where apartment houses are operated under a fictitious name and do business under such name (for example, when said name is referred to in the making of contracts, execution of leases, payment of rent, and other business transactions), they should be required to register under the fictitious name statute. However, in those cases where a small apartment house merely has a name, but the owner thereof does not do business under such name and the name is not referred to in the making of contracts, execution of leases and other business transactions involving the management of such apartment house, I do not believe that the mere fact that the apartment has a name would bring it within the purview of §865.09, F. S. This appears to answer your third question.

AFFRAYS; RIOTS; ROUTS; UNLAWFUL ASSEMBLIES

December 21, 1951—051-481.

TAMPA CIVITAN CLUB—PARADES—WEARING HOODED GOWNS—EXEMPTIONS

QUESTION: May persons engage in a parade sponsored by the Tampa Civitan Club wherein the participants will wear hooded gowns covering the body from head to foot, representing persons who have lost their lives in traffic accidents during the year 1951 in Tampa and Hillsborough County? The purpose of the parade is to further public safety and it will travel over six city blocks and will take place at 2 P. M. during some day in the month of January.

To: Honorable H. C. Hamm, Director, Traffic Bureau, Police Department, Tampa, Florida:

The 1951 Legislature passed an act (Ch. 26542 now §§876.11-876.21, F. S.) prohibiting the wearing of a mask, hood or any device whereby any part of the face is so hidden, concealed or covered as to conceal the identity of the wearer while upon the public ways in this state or upon property owned by the city, county or state, etc. (See §§2 and 5 of said Chapter). Section 6 of said act exempts certain classes of people from the provisions of §§2 through 5 of the act. Among those exempted are "any person or persons using

masks in theatrical productions, including use in Gasparilla celebrations and masquerade balls." It is my opinion that the hoods and masks described in your letter to be used to further the purposes of public safety fall so closely within the spirit and intentment of the above cited exemption that we may reasonably answer your question affirmatively. You will note that the use of masks in theatrical productions include those used in Gasparilla celebrations which would include parades, therefore not confining the performances to the stage.

Theatrical is defined by Webster as "resembling the manner of dramatic performers; histrionic." Theatricals is defined by Webster as "a dramatic performance, especially by amateurs." It is quite obvious from the facts stated in your letter that the performance by the participants in the parade will be in the nature of a dramatic performance by amateurs and not the type of wearers of hoods, masks or devices which the statute intends to prohibit.

CRIMINAL ANARCHY, COMMUNISM, ETC.

August 6, 1951—051-264.

LOYALTY OATH—CANDIDATES FOR PUBLIC OFFICE

QUESTION: In view of the fact that Ch. 26870, Laws of 1951, (The Election Code of 1951), which becomes effective on September 1, 1951, made no mention of the requirements of §§876.05 to 876.10, inclusive, F. S., providing a loyalty oath to be executed, among others, by all candidates for public office, on and after the effective date of Ch. 26870, will candidates for public office be required to comply with the loyalty oath requirements of §§876.05 to 876.10?

To: Honorable R. A. Gray, Secretary of State:

It is sufficient here to state that §876.05 requires, among other things, that "all candidates for public office" take the loyalty oath set forth therein.

Chapter 26870, in revised and amended Ch. 99, F. S., as therein set forth (pages 20 to 28, both inclusive, pamphlet copy of Ch. 26870), sets forth, among other things, provisions having to do with candidates qualifying for public office and names to be printed on election ballots. Generally it may be stated that as to such features, revised Ch. 99 deals with matters now appearing in Chs. 99 and 102, F. S.

Sections 876.05 to 876.10 were originally Ch. 25046, Laws of 1949. Not only do the requirements of such sections in relation to the loyalty oath mentioned apply to candidates for public office, but also to all persons who now or hereafter are employed by or are on the pay roll of the State of Florida, its departments, agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties. It is to be noted that at times the loyalty oath prescribed by these sections is referred to as the anti-communist oath. Thus, these sections are police regulations which go beyond the ordinary and usual requirements of candidates qualifying in primaries, embracing as they do those who work for the state, counties, etc., or hold public office in this state.

Chapter 26870 is a complete revision, among other laws, of present Chs. 97 to 104, F. S., both inclusive, relating generally to registrations and elections. Specifically, §9 of Ch. 26870 repeals Chs. 105, 106 and 875, F. S., together with sections or parts of sections appearing in Chs. 97 to 104, F. S., both inclusive. There is no general repealing clause. Hence, if irreconcilable conflicts exist between any provisions of Ch. 26870 and those of §§876.05 to 876.10, the conflicting provisions in such sections will be repealed by implication. The only argument that could be urged that, as to candidates for public office, the provisions of §§876.05 to 876.10 were repealed by implication by Ch. 26870, would derive from these facts and circumstances: certain provisions of Ch. 26870 purport to set forth all prerequisites for the qualifying of candidates and conditions under which candidates' names may be printed on election ballots; Ch. 26870 is the last legislation on this general subject; since §§876.05 to 876.10 set forth an additional condition for the qualifying of candidates, it must yield to the last legislative expression mentioned. We cannot adhere to such reasoning. On repeated occasions our court has held in effect that repeals by implication are not favored and will not be deemed to have been intended unless that intention is clearly manifest (e.g. *Todd v. L. & N. R. R. Co.*, 67 So. 84; *Dade County v. City of Miami*, 82 So. 354; *Scott v. Stone*, 176 So. 852). We do not consider that there is here any clear legislative intent that any of the provisions of Ch. 26870 disturb the provisions of §§876.05 to 876.10 in relation to candidates for public office; indeed, since there is no general repealing clause and these mentioned sections are not specifically set forth with other named sections repealed, this would affirmatively indicate the legislative intent that §§876.05 to 876.10 are not disturbed in any way by Ch. 26870.

The fact that Ch. 26870, Laws of 1951, setting forth, among other things, prerequisites to the qualification of candidates for public office and the printing of names of candidates on election ballots, effective September 1, 1951, did not mention or include in said chapter the provisions set forth in §§876.05 to 876.10, both inclusive, F. S., did not repeal by implication any of the provisions of such last named sections relating to candidates for public office. In other words the requirements of such last named sections that candidates for public office must make the loyalty oath set forth in §876.05 will continue to be existing law of Florida on and after the date Ch. 26870 becomes effective.

CHAPTER XLV

CRIMINAL PROCEDURE

ARRESTS

January 12, 1951—051-12.

COUNTY OFFICERS—ARRESTS—MUNICIPAL JAIL— IMPRISONMENT IN

QUESTIONS: 1. May the City of Winter Haven, Florida, permit the use of its municipal jail for the temporary imprisonment of persons arrested by the sheriff or constables of Polk county, Florida, for the violation of state criminal statutes and laws?

2. If the above question is answered in the affirmative, may the municipality charge the county commitment, release, and other appropriate fees and charges for such use?

3. If county authorities have the right to use the municipal jail for the temporary imprisonment as aforesaid, is the municipality under any obligation to provide such facilities to the county to the exclusion of its own prisoners and use?

To: *Honorable Harry E. King, City Attorney, Winter Haven, Florida;*

The City of Winter Haven, Florida, is a municipal corporation with perpetual succession and may "contract and be contracted with, and may sue and be sued," (§1, Ch. 11299, Laws of 1925). It has power and authority "to lease, receive and hold property, real, personal and mixed, within the city . . . ; and to sell, lease or otherwise dispose of the same for the benefit of the City . . . ; to provide and organize police, fire, . . . departments of the city and to maintain the same; . . . to adopt and enforce, within the corporate limits, police . . . regulations . . . and all other powers which, under the Constitution and laws of Florida, would be competent for this paragraph specifically to enumerate." (see §2, Ch. 18986, Laws of 1937). The charter also provides for a municipal court with power to impose prison sentences. Under the general statutes municipalities have power and authority to "erect all necessary public buildings and control and dispose of the same as the interests of the city or town may require." (see §167.21, F. S.). A municipal corporation has implied authority to erect, own and maintain jails and other public buildings (63 C.J.S. 634, §1041; 38 Am. Jur. 250, §562; 3 McQuillan Municipal Corporations 992, §1218).

The erection and operation of prisons and jails, whether by the State, a county or a municipality, is purely a governmental function being an indispensable part of the administration of the criminal laws. They are a part of the police system for the preservation of order and the security of society. They are a public necessity. (41 Am. Jur. 886, §3). Although there is a recognized distinction between the prisons of the State and its political subdivisions, they

are a part of the penal system of the State (see 50 C. J. 332, §9). Many decisions seem to recognize the right of public authorities to lease or rent public buildings not needed for public use (64 C. J. S. 282-5, §1809) including prison property (50 C. J. 342, §35). Primarily a municipal jail is for the keeping of municipal prisoners and any other use to which it may be put should not in any way interfere with its said use. Some statutes authorize a county to permit its jail to be used by a municipality (for example, the City of Tallahassee uses the Leon county jail for the keeping of its prisoners) and we know of no constitutional reason why a county might not be authorized to use a municipal jail.

We find no statutory prohibition against the City of Winter Haven leasing or granting to the county the right to use its jail for the keeping of county prisoners. Assuming that the county has authority to lease jail rights we find nothing in the municipal charter of Winter Haven which would prevent its leasing to the county the right to use its jail, provided the entire capacity of the municipal jail is not needed for municipal purposes. Some of the above quoted portions of the municipal charter seems to authorize the leasing of municipal property, especially when not needed for municipal use. However, we do not think that the municipality should permit the general use of its jail by any constable or by the sheriff of the county in the absence of some lease or other definite arrangement for its use entered into between the county and the municipality. These leases or arrangements might be in the nature of granting to the county the right to use a certain or certain portions of the municipal jail, with the county or sheriff's office maintaining a deputy as jailor to receive and keep the county prisoners, or the municipality might agree to take and keep the county prisoners. If the county leases the use of a definite portion of the jail and maintains its own jailor then the municipality would not be interested in the authority to receive prisoners, as that would be a question to be determined by the sheriff or other proper county officer.

Should the municipality agree to take and keep the county prisoners then it would be acting as jailor for the county and should only accept prisoners when accompanied by proper commitment papers, unless the case be such as to permit imprisonment without process. Although a peace officer is authorized to make arrests without warrant under the circumstances outlined under §901.15, F. S., he is required to take the person arrested before a magistrate and make complaint against him (§901.23, F. S.). Under §9 of the Declaration of Rights of the State Constitution all persons charged with crime, except certain capital offenses, are entitled to bail. (*Varholy v. Sweat*, 153 Fla. 571, 15 So. 2d. 267; *ex parte Hatcher*, 86 Fla. 330, 98 So. 72). No person should be needlessly incarcerated or held prisoner when the crime for which he is charged is bailable (*Ex Parte Hatcher*, 86 Fla. 330, 98 So. 72, text 74). Where there is an unreasonable delay in taking a person, arrested without a warrant, before a magistrate the arresting officer, or person holding such person prisoner, may become guilty of a false imprisonment (35 C.J.S. 546, §31). Although reasonable detention following a lawful arrest is justifiable, generally the imprisonment of another without a mittimus or other lawful process is illegal (35 C.J.S. 521, §21). See also 6 C.J.S. 617 and 619, §17. Where the municipality

is acting as jailor for the sheriff or constable it should require a commitment or similar process, except in cases where imprisonment without process is clearly authorized. No attempt will be made to designate the cases where or when imprisonment without process is authorized, as each case must stand upon its own facts.

A municipality has jurisdiction and control over its jail including policies established for its operation and a constable or sheriff has no right to make general use of it unless definite prior arrangements are entered into with the municipality.

Under the above and foregoing authorities and observations the above questions are answered as follows: The *first question* is answered in the affirmative; the answer to the *second question* depends upon the agreement, between the county and the municipality, for the use of the municipal jail; and the *third question* is answered in the negative.

August 9, 1951—051-267.

CONSTABLES — ARRESTS WITHOUT WARRANT— TERRITORIAL JURISDICTION

QUESTIONS: (1) Can a constable returning to his district and while in his county and approximately one half mile outside of his district who meets a drunken driver, driving at a high rate of speed on the left side of a public road make an arrest of the drunken driver?

(2) If the arrest can be made by the constable under the circumstances set forth in question (1), shall the prisoner be returned to the county judge to be tried by him?

To: Honorable Leo Kirkland, Constable, Graceville, Florida:

For the purposes of this opinion it is sufficient here to state that §901.15 (1), F. S., provides that a peace officer may without warrant arrest a person when the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence and that in the case of such arrest for a misdemeanor or violation of a municipal ordinance the arrest shall be made immediately or upon fresh pursuit.

Section 901.15 in relation to question (1) above was construed by my immediate predecessor in office in opinion 045-90 (A.G.R. 1945-46, page 742). That opinion concludes as follows:

"... it is my opinion that a constable has no authority to make an arrest without warrant in any part of his county outside his own district, except (1) upon lawful hot pursuit of a fleeing criminal; and (2) when acting as a private citizen to make an arrest without warrant."

It is understood that the exception in the above quotation "upon lawful hot pursuit" contemplates pursuit originating in the constable's district. I agree with this former opinion.

At common law a private person may arrest without warrant one who is committing or who is attempting to commit a felony in his presence, and may arrest without a warrant one committing a

misdeemeanor which constitutes a breach of the peace in his presence (6 C.J.S., pages 606, 607, §8 (b) and (c)). While it does not appear that our Supreme Court has had occasion to announce the common law right of a private citizen to arrest without warrant a person committing a breach of the peace in his presence, the stated common law rule with respect to the right of such a citizen to arrest for felony committed in his presence has been announced not only by our Supreme Court but by the federal courts (*Poole v. State*, 129 Fla. 841, 177 So. 195, appeal dismissed 303 U.S. 619; *Dorsey v. U. S.*, C.C.A. Fla., 174 F. 2d. 899, certiorari denied, 338 U.S. 950).

A breach of the peace includes all violations of public peace, order or decorum, consisting, among other acts, of acts of public turbulence in violation of the common peace and quiet, and acts which threaten danger and disaster to the community. (11 C.J.S., pages 817, 818, §§ (1) and (2)).

It is apparent that an intoxicated person operating a car on the left side of a public highway at a high rate of speed at 12:30 A. M., is guilty of one or more misdemeanors under our statutes. An automobile operated on the public highways of this state has been declared a dangerous instrumentality (*Southern Cotton Oil Company v. Anderson*, 80 Fla. 441, 86 So. 629). In view of such characterization it would appear that the operation of an automobile in the dangerous and careless manner set forth in the first question would constitute a breach of the peace.

Section 901.23, F. S., requires an officer who has arrested a person without warrant to take the person arrested without unnecessary delay before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and to make before the magistrate proper complaint, or if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

We have no similar statute covering the duty of a private citizen who arrests a person without a warrant. Authorities from other jurisdictions seem to require that when a private person makes an arrest he may hold his prisoner in custody only for a reasonable time and he must, without undue delay, either take him before a magistrate, turn him over to an officer, or place him in jail. If he fails to do so he cannot justify the arrest (6 C.J.S., page 619, §17 (b)).

In view of the foregoing, the above questions properly are answered as follows:

(1) A person who is a duly elected constable has no authority in his official capacity to arrest another person outside of his district committing a misdemeanor or misdemeanors in his presence, as outlined in the question. This officer as a private citizen would have the power to arrest the operator of an automobile violating the law in his presence in the manner set forth in this question.

(2) We have no statute law directing the disposition by a private citizen of a person he has lawfully arrested without warrant. It is suggested, however, that if the private citizen follows the pro-

cedure prescribed for officers who arrest without warrant, set forth in §901.23, such private citizen shall have disposed of the person so arrested in a legal manner.

September 4, 1952—052-268.

MUNICIPAL POLICE OFFICERS—ARRESTS—SERVICE OF PROCESS

QUESTIONS: 1. Does a Florida municipal police officer have authority to serve a warrant in Florida which is issued in another state?

2. What authority, if any, does a municipal police officer have to arrest a defendant (a) when he receives an arrest warrant for such defendant from a sheriff or constable of another county in Florida, charging either a felony or a misdemeanor, and is directed by such sheriff or constable to pick up the defendant and hold him for delivery, or (b) when the police officer merely receives from such sheriff or constable a telephone call or telegram advising that an arrest warrant has been issued against such defendant and requesting that he be arrested?

3. What is the proper procedure for the arrest of a person in Florida for the purpose of holding him as a fugitive from the justice of another state, prior to the issuance of an extradition warrant for such person by the Governor of Florida?

4. What authority, if any, does a municipal police officer have to make arrests upon the basis of pick-up notices sent out by other officers?

5. What is the liability of a municipal police officer, and of the city, when such police officer makes an arrest not authorized by law?

To: Honorable Virgil Stuart, Secretary, Florida Peace Officers' Association, Assistant Chief of Police, St. Augustine, Florida.

AS TO QUESTION ONE

An arrest warrant issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state under whose authority it was issued. (4 Am. Jur. 14, Arrest, §19; *Passett v. Chase*, 107 So. 689). This rule applies to all kinds of arrest warrants, including bench warrants.

For that matter, as will hereinafter be shown in our answer to Question 2, a municipal police officer has no right to serve a warrant issued by a state court in Florida.

Therefore, a municipal police officer has no right to serve a warrant issued in another state.

Notwithstanding, a municipal police officer has no right to directly serve a warrant issuing from another state or from a state court in Florida, it will be demonstrated hereinafter that a municipal police officer as a peace officer is given statutory authority in many instances to arrest without warrant the same persons who a properly authorized officer could arrest with a warrant.

AS TO QUESTION TWO

A municipal police officer has no authority to execute any arrest warrant issued by a state court. The power to execute such warrants is vested solely in sheriffs and constables (§901.04, F. S.).

However, a municipal police officer is a peace officer (4 Am. Jur. 17-18, Arrest, §24; also see *Osborne v. State*, 100 So. 365).

Section 901.15 (4), F. S., authorizes a municipal police officer, as a peace officer, to arrest a person without a warrant when a warrant has been issued charging such person with a criminal offense, whether felony or misdemeanor, and placed in the hands of a peace officer for execution. This means placed in the hands of the sheriff or constable or with someone who has authority to receive same for his office, such as a clerk, deputy clerk, deputy sheriff, etc. Many municipal police officers accept as authentic communications by mail, telephone, telegraph or word of mouth to the effect that a warrant has been issued by a state court and placed in the hands of a sheriff or constable for execution. The reason for this provision of law is to facilitate the speedy detection and apprehension by peace officers working in cooperation of criminals who use the fast-get-away automobile and other modern modes of transportation to flee from the city or county where they committed crimes to other jurisdictions.

It is therefore my opinion that any peace officer who receives authentic information by any of the means of communication referred to above that a sheriff or a constable has in his hands a warrant charging a criminal offense, such peace officer may lawfully arrest the person charged without a warrant.

AS TO QUESTION THREE

Sections 941.13 and 941.14, F. S., parts of the Chapter dealing with Extradition, make full provision for the arrest of fugitives from justice prior to the issuance of extradition warrant by the Governor of Florida.

Thus, it is plain that there are three methods by which a person may be arrested in Florida for the purpose of holding him as a fugitive from another state prior to the issuance of an extradition warrant: (1) When a credible person appears before a judge or committing magistrate of the State of Florida and charges the fugitive with the commission of a crime in another state and with having fled from the justice of said state or with having been convicted in that state and escaped from confinement, or with having broken the terms of his bail, probation or parole, and is believed to be in this state. (2) Whenever a complaint has been made before a judge or a committing magistrate in this state setting forth on the affidavit of a credible person in another state that a crime has been committed in such other state and that the accused person or fugitive has been charged in that state with the commission of the crime and has fled from the justice of that state, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole and is believed to be in the State of Florida. (In each of these two cases the judge or committing magistrate may issue a warrant to the sheriff or any constable of the state commanding

him to apprehend the person named in the warrant and when the warrant has been issued and the municipal police officer has been apprized of same, he may arrest the accused or fugitive without a warrant.) (3) A peace officer or private citizen may arrest a fugitive without a warrant upon reasonable information that the accused or fugitive stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. (In case of such an arrest without a warrant, the fugitive or accused must be taken before a judge or magistrate with all practicable speed and a complaint under oath made against him setting forth the ground for the arrest.)

AS TO QUESTION FOUR

AS TO PICK-UP NOTICES RECEIVED FROM OTHER PEACE OFFICERS OF FLORIDA:

As above shown, under §901.15 (4), F. S., a police officer may arrest a person when a warrant has been issued for such person, charging the violation of a Florida law, whether felony or misdemeanor, and placed in the hands of a sheriff or constable for execution.

Section 901.15 (3), F. S., authorizes a municipal police officer to arrest a person when he has reasonable ground to believe that a felony has been committed in Florida and has reasonable ground to believe that the person to be arrested has committed it. When a municipal police officer receives a pick-up notice from another peace officer of Florida showing that a named person is wanted by the officer sending out the pick-up notice for a crime which is a felony under the laws of Florida (a crime punishable by death or imprisonment in the state prison) then I think that the municipal peace officer receiving the notice has reasonable grounds to believe that a felony has been committed and reasonable grounds to believe that the wanted person committed it, and has authority to arrest the wanted person.

AS TO PICK-UP NOTICES RECEIVED FROM FEDERAL OFFICERS:

A municipal police officer has the common law right of a private citizen to arrest for a felony, whether Federal or State, under certain circumstances.

Under the common law rule, which is applicable in Florida, a private citizen may arrest (a) where a felony has *actually been committed* (probable cause to believe that a felony has been committed not being sufficient) and (b) such citizen has reasonable ground to believe that the person arrested committed it. (4 Am. Jur. 25, Arrest, §37; 6 C.J.S. 606-607, Arrest, §8-b-2). However, if the private citizen has time to procure the issuance of a warrant and, instead of doing so, goes ahead and makes the arrest, he can justify the arrest only by proving that the person arrested was actually guilty of the crime for which the arrest was made. (4 Am. Jur. 26, Arrest, §37; *Dorsey v. United States*, 174 Fed. 2d 899).

A municipal police officer, acting as a private citizen, may arrest for a federal felony if he acts in compliance with these rules. (A federal felony is a crime under the laws of the United States

which is punishable by death or imprisonment for a term exceeding one year. Title 18 U.S.C.A., §1.) He acts at his peril when he arrests for a federal felony upon the strength of a pick-up notice even if it is sufficient to give him reasonable grounds to believe that a federal felony has been committed and that the person to be arrested has committed it, because reasonable grounds to believe that a federal felony has been committed will not suffice; a federal felony must actually have been committed *and* he must have reasonable grounds to believe that the person to be arrested committed it.

A municipal police officer, acting as a private citizen has no authority to arrest for a federal misdemeanor (a federal crime which is not a felony) upon the basis of a pick-up notice.

AS TO PICK-UP NOTICES RECEIVED FROM PEACE OFFICERS OF OTHER STATES:

As above shown, §941.14, F. S., authorizes any peace officer or private citizen to arrest without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year. This statute is the only authority for a municipal police officer to arrest a person for a crime committed in another state against the laws of that state, (except that, when justified under the rules of law hereinabove set forth in our discussion of Federal pick-up notices, such officer, acting purely as a private citizen and not as an officer, may arrest for a felony committed in another state). To justify an arrest under this statute upon the basis of a pick-up notice, without further information, it is necessary that the pick-up notice show that the person to be arrested (1) actually stands charged in a court of another state (2) with an offense punishable in that state with death or imprisonment for a term exceeding one year. If either of these facts does not appear from the pick-up notice, a municipal police officer is not justified in making the arrest unless he procures from some other source reasonable information that said fact exists.

AS TO QUESTION FIVE

If a municipal police officer arrests a person without authority of law, and actually restrains or detains the arrested person by actual force or reasonably apprehended force, though actual force is not necessary, such policeman is guilty of the common law offense of false imprisonment (See 35 C.J.S. 622-623, "False Imprisonment", §71), which offense, in my opinion, is punishable in Florida under §§775.01 and 775.02, F. S. I think that in such case, the policeman is also liable to suit for false imprisonment.

The rule is well settled that a municipal corporation is not liable for false imprisonment committed by its policemen (*Brown v. Town of Eustis*, 110 So. 873; *Kennedy v. City of Daytona Beach*, 182 So. 228; *Swanson v. City of Fort Lauderdale*, 21 So. 2d 217), unless liability is imposed by the city charter or other statute. I know of no general statute imposing such liability. If a special law setting up a city charter, or otherwise dealing with the city, imposes such liability, then, of course, the city is bound by it if it is a valid law.

BAIL

September 27, 1951—051-339.

COURT OF RECORD—CIRCUIT COURT—CONCURRENT
JURISDICTION—BAIL BOND FORFEITURE

QUESTION: Does the Court of Record of Escambia County have concurrent jurisdiction with the Circuit Court of Escambia County to enter judgment in proceedings to enforce forfeiture of bail bonds as provided by §903.28, F. S.?

To: *Honorable J. B. Hopkins, Assistant County Solicitor, Escambia County, Pensacola, Florida:*

Section 903.28, F. S., is a summary statutory proceeding for the entry of judgment to enforce forfeiture of bail bonds. It was first enacted by the legislature of 1939 as Ch. 19554, §71, and is a part of the comprehensive Criminal Procedure Act of 1939.

Prior to 1939, this subject was covered by Ch. 4403, Laws of 1895, C.G.L. 1927, §§8351 to 8361. These statutes provided a summary proceeding for the estreat of bail bonds and gave exclusive jurisdiction of such proceedings to the circuit courts of this state. While §71, Ch. 19554, Laws of 1939, is not identical with Ch. 4403, Laws of 1895, they are very similar, and it is apparent that the latter statute is a revision and codification of the former.

The Court of Record of Escambia County was created by the adoption of §39, Art. V, of the Constitution of Florida, at the general election of 1910. This amendment gave the Court of Record concurrent jurisdiction with the Circuit Court of Escambia County in all matters criminal, civil and equitable, except capital cases and the power to summon and empanel a grand jury. Prior to the adoption of this amendment, the Court of Record of Escambia County was known as the Criminal Court of Record and had jurisdiction only of criminal cases less than capital.

Article V, §11, of the Constitution of Florida, enumerates and details the jurisdiction of the circuit courts and provides that they shall have jurisdiction "... and of such other matters as the legislature may provide." Article V, §39, creating the Court of Record of Escambia County, does not contain any provision which would permit the enlargement of its jurisdiction from that which existed at the time the court was created.

It is a well established rule of constitutional construction that the jurisdiction of courts may not be enlarged beyond the powers granted to the court by the Constitution. But, where the Constitution specifically authorizes the legislature to confer additional jurisdiction upon a particular court, such additional jurisdiction may be conferred on that court by the legislature. 14 Am. Jur. 366, §§163 and 164. This rule of constitutional construction has been thoroughly treated and approved by the Supreme Court of Florida in the case of *Ex parte Cox*, 44 Fla. 537, 33 So. 509.

At the time of the creation of the Court of Record of Escambia County, the circuit courts of Florida had exclusive jurisdiction to enter judgments for the enforcement of bail bond forfeitures by

virtue of the proceedings provided for by Ch. 4403, Laws of 1895, §8354, C.G.L. This was a valid grant of jurisdiction to the circuit courts under §11, Art. V, of the Constitution.

It is apparent that at the time of the adoption of the constitutional amendment (§39, Art. V), creating the Court of Record of Escambia County, the circuit courts of this state were vested with exclusive jurisdiction to try and determine all matters arising out of the forfeiture of all bail bonds in this state; and that by virtue of said constitutional amendment, the Court of Record of Escambia County was vested with concurrent jurisdiction with the Circuit Court, as such jurisdiction existed at the time of the adoption of §39, Art. V, Constitution of Florida.

It is therefore my opinion that the Court of Record of Escambia County, Florida, has concurrent jurisdiction with the Circuit Court, to enter judgments for the enforcement of bail bond forfeiture in the summary proceedings provided for by §903.28, F. S., §71, Ch. 29554, Laws of 1939.

December 31, 1951—051-484.

ARRESTS—PEACE OFFICERS' JURISDICTION— NONRESIDENT COUNTIES—SURETY—CRIMINAL BAIL BOND

QUESTIONS: 1. Where a surety on a criminal bail bond wishes to surrender the defendant in exoneration of his liability as surety, and by written authority endorsed on a certified copy of the bond empowers a peace officer in "A" county to arrest the defendant for the purpose of surrendering him, does such officer have the right to arrest the defendant in "B" county?

2. If the answer to Question 1 is in the negative, what law does the peace officer of "A" county violate by arresting the defendant in "B" county without consulting peace officers in "B" county?

To: Honorable W. H. Wells, Sheriff, Flagler County, Bunnell, Florida:

AS TO QUESTION 1.

At common law, a surety on a criminal bail bond could personally arrest the defendant for the purpose of surrendering him in exoneration of the surety's liability, and the surety could, if he desired, appoint an agent to make the arrest for him. (6 Am. Jur. 106, "Bail and Recognizance", §113; 8 CJS 173-174, "Bail", §87-C).

However, the matter of such arrests is now controlled by statute, viz., §903.22, F. S., which preserves the right the surety had at common law to personally arrest the defendant for the purpose of surrendering him. However, said statute curtailed the common law right of the surety to appoint an agent to make the arrest in that it restricts the surety to appointing a peace officer instead of just any person that the surety might wish to appoint.

A peace officer has no jurisdiction outside of his own bailiwick and he acts as a private citizen if he attempts to exercise such jurisdiction. (See 47 Am. Jur. 842-843, "Sheriffs, Police, and Constables", §29; 57 C.J. 775, "Sheriffs and Constables", §125).

Said §903.22, F.S., does not purport to extend the territorial jurisdiction of peace officers, and since a peace officer is a peace officer only in his own bailiwick and is only a private citizen when it comes to making arrests in another county (except, perhaps, in hot pursuit, a question not here involved and therefore not necessary to decide), it is my opinion that Question No. 1 is properly answered in the negative.

AS TO QUESTION 2.

While we have answered the above question in the negative, I find no criminal statute which is violated by a peace officer who goes into another county to make an arrest of a defendant for the purpose of surrendering him in exoneration of bail. The law leaves the defendant in such a case to his remedy by suit for damages. If necessary in order to protect the rights of the public, the offending peace officer may be removed from office for his misconduct.

MOTION TO QUASH AND PLEAS

June 6, 1951—051-146.

COUNTY JUDGE'S COURT—MISDEMEANOR CASES—PLEAS

QUESTION: Is it lawful and proper for a county judge to accept and enter, in a misdemeanor case, a plea of guilty in the absence of the defendant when the defendant advises such judge in writing, by mail or otherwise, that he desires to plead guilty to the charge against him?

To: Honorable Fred T. Bennett, County Judge, Chipley, Florida:

Standing alone, §909.07 would appear to require that under no circumstances can a plea be entered except orally in open court. However, §909.08, F. S., provides that "Except where the defendant is a corporation, a plea of guilty to a charge of *felony* shall not be accepted unless the defendant is present."

Also, §914.01, F. S., specifically requires that a defendant shall be present when a plea is made in a prosecution for *felony*, but provides that "Persons prosecuted for *misdemeanor* may, at their own request, by leave of court, be tried in their absence from the court."

When §§909.08 and 914.01 are construed with §909.07, the result appears to be that a plea in a misdemeanor case must be pleaded orally in open court unless the defendant, at his own request and by leave of the court, enters a plea while absent, by attorney or in writing. This conclusion appears to be sustained by the following quotation from an annotation found in 110 A.L.R., page 1301:

"The decisions are not agreed, at least in result, as to the sufficiency of a plea of guilty made in the defendant's absence, although in *misdemeanor* cases such pleas have generally, it seems, been sustained, when authorized by the defendant."

I think that a defendant in a misdemeanor case in a county judge's court may, with the consent of the county judge, file a

signed written plea of guilty, transmitting the same to the county judge by mail or otherwise, with such plea to be properly entered of record. However, I do not think that this requirement is met when the defendant merely advises the county judge in writing that he desires to plead guilty to the charge against him. A plea, rather than the expression of a desire to enter a plea, is necessary.

I suggest that no written plea of guilty should be accepted in the absence of the defendant unless and until the county judge satisfies himself that such plea is authentic and genuine.

DISMISSAL OF PROSECUTION

June 30, 1951—051-186.

CRIMINAL COURT OF RECORD—"ABSENTEE DOCKET"

QUESTIONS: 1. What authority has the prosecutor to place a case on the "absentee docket", and what is its legal status while thereon?

2. How long would a case have to remain on the "absentee docket" before it would automatically die or become inoperative?

3. Would §915.01, F. S., be running during the time a case was on such "absentee docket"?

To: Honorable William T. Harvey, Judge Criminal Court of Record, Jacksonville, Florida:

AS TO QUESTION ONE

I understand that an "absentee docket" has been kept for the Criminal Court of Record of Duval County for many years. However, I find no requirement of law for the keeping of such a docket and therefore I think that you, as Judge of said court, have full authority to discontinue its use.

If you should permit the further use of said absentee docket, then I think that it is entirely within your discretion as to whether to permit a case to be passed thereto. I am of the opinion that the prosecuting attorney has no authority to pass a case to said docket, although he may move for such a transfer, and it is discretionary with the court as to whether to grant the motion. It is also within the court's discretion to grant or deny a motion by the prosecuting attorney to transfer the case back to the active docket.

As to the legal status of a case on the absentee docket, I think that such a case is subject to the control and disposition of the court. From a legal standpoint, I see no difference between the status of a case which is on the absentee docket and the status of a case which is not on said docket, both being pending and subject to the orders of the court; except, however, that, as held by the Supreme Court in *Likens v. State*, 16 So. 2nd 158, a defendant whose case is on the absentee docket is not disqualified for jury duty upon the theory that he is "under prosecution", affirmative action being necessary to revive the prosecution of a case which is on the absentee docket.

A case on the absentee docket may be in a state of quiescence

or suspension, but it is still in court and is still subject to the control of the court.

AS TO QUESTION TWO

Unless a case runs afoul of §915.01, F.S. (hereinafter discussed under Question Three), or is finally disposed of by order of the court, I think that it will remain alive and operative indefinitely. This is true of cases on the absentee docket as well as those on the active docket.

AS TO QUESTION THREE

Section 915.01, F.S., was enacted to effectuate the right to a speedy trial which is guaranteed to an accused by §11 of the Declaration of Rights of the Constitution of Florida.

Whether this statute runs while a case is on the absentee docket depends upon whether the defendant in the case comes within the terms of the statute. If he does come within its terms, it will run to the same extent as if the case were on the active docket.

In this connection, please note that the statute gives the defendant a *right* to a speedy trial, which right he can waive by his actions or by inaction; and that the statute requires the defendant to make an affirmative demand for trial before the statute begins to run. In other words, the mere passage of time will not terminate a prosecution where the defendant does not request a trial or where he has in some other manner waived his right to a speedy trial.

JUDGMENT AND SENTENCE

March 7, 1951—051-46.

COUNTY JUDGE'S COURT—FINE AND COST BOND POSTED WITH SHERIFF—DEFAULT OF PAYMENT

QUESTION: After being sentenced by the County Judge's Court of Jackson County to pay a fine and the costs of prosecution and, in default of such payments, to serve a term in the county jail, and after being committed to the custody of the sheriff under such sentence, a defendant posted with said sheriff a 90-day fine and cost bond and was released from custody. The 90-day term of the bond has expired and the bond has not been paid. The defendant is now in Duval County. Can the sheriff of Duval County arrest said defendant under said original commitment (which is directed "to the Sheriff or constable of said county", meaning Jackson County) and deliver him to the sheriff of Jackson County for the purpose of subjecting him to said sentence?

*To: Honorable Ernest F. Barnes, Sheriff, Jackson County, Mari-
anna, Florida:*

Section 921.15, F.S., provides the procedure to be followed in case default is made in the payment of a fine and cost bond posted with the sheriff. It provides that, in case of such default, the sheriff "shall indorse on the bond that default has been made in the payment, and having signed such indorsement, shall file the

bond with the clerk of the court in which judgment was rendered . . . and the person convicted shall be liable to be proceeded against, as if no such bond had been given, until the same has been fully paid and satisfied."

Thus, after the sheriff indorses on the bond the fact that default has been made in payment, and after the sheriff files the bond with the Clerk of the County Judge's Court of Jackson County, the defendant may then be proceeded against as if no bond had been given.

If no fine and cost bond had been given, the issuance of the commitment would authorize the taking of the defendant into custody. Since the defendant is in Duval County, outside of the territorial jurisdiction of the Jackson County Sheriff, I think that, if no bond had been given, the proper procedure would be for the sheriff of Duval County to take the defendant into custody under the commitment and deliver him to the sheriff of Jackson County, just as is done in the case of an arrest warrant issued in Jackson County for the arrest of a person in Duval County. Since that would be the proper procedure if no bond had been given, it is the proper procedure to be followed in the case outlined by you, after the bond is indorsed and filed as required by §921.15.

The commitment is not directed to any officer outside of Jackson County, but it does not need to be directed to any other officer in order for the Sheriff of Duval County to have authority to act under it in the circumstance and manner above outlined. The applicable statutes do not contemplate that a commitment be directed to an officer outside of the county in which it is issued (§§922.01; 937.01, 937.11 and 937.12, F. S.), but, nevertheless, a commitment runs and is of full force and effect throughout the State as authority for the sheriff of any county to take into custody the defendant named therein (§§932.01 and 932.02, F. S.).

April 4, 1951—051-75.

SHERIFFS—STAY OF EXECUTION OF SENTENCE TO FINE; BOND AND PROCEEDINGS

QUESTION: On the 13th day of October, 1949, a subject upon being convicted in Polk County, Florida, secured the services of a Surety company who in turn posted a ninety day or a Fine and Cost Bond. Prior to the termination of the aforesaid bond the subject was rearrested in another county and confined to the State Prison at Raiford.

My question is, should I force the Surety Company to pay the fine and cost in order to clear my records or would I be within my rights to show that the subject was in the State Prison and place a detainer against him thereby delaying the county in the collection of this bond until the subject is released from the State Prison at Raiford?

To: Honorable A. Hagan Parrish, Sheriff, Polk County, Bartow, Florida:

It appears that under the provisions of §921.15 (2), F. S., it is mandatory upon the sheriff to proceed against the surety if the fine

and costs have not been paid at the expiration of the 90-day period provided, regardless of the circumstances.

May 24, 1951—051-138.

COUNTY COURT—JUDGMENT AND SENTENCE—COST AND FINE REFUND

QUESTION: On March 13, 1951, a defendant pled guilty to a charge of aggravated assault in the County Court of Seminole County, in the belief that the assaulted person was out of danger and about to recover. Thereupon, the defendant was adjudged guilty and sentenced to pay a fine and the costs of prosecution, which fine and costs were paid to the Sheriff, who turned the same into the fine and forfeiture fund. On March 17, 1951, the assaulted person died. On March 18, 1951, the defendant was indicted in the Circuit Court for the murder of the assaulted person. Did said County Court have jurisdiction on April 23, 1951, upon motion that day filed, to set aside said judgment and sentence and order the board of county commissioners to refund to said defendant the amount of said fine and costs upon the theory that the defendant was being wrongfully placed in double jeopardy?

To: Honorable L. O. Boyle, County Attorney, Sanford, Florida:

It is clear that the defendant was not, and could not be, placed in double jeopardy in the County Court by any proceedings in the Circuit Court subsequent to the judgment and sentence in the County Court.

If the defendant had been placed in double jeopardy by the proceedings in the Circuit Court, the remedy would have been in that Court, not in the County Court. But, since the assaulted person died after the defendant's conviction in the County Court for aggravated assault, the defendant was not placed in double jeopardy by thereafter being charged with murder in the Circuit Court. (*Southworth v. State*, 125 So. 345).

Therefore, the facts do not take the case out of the general rule that, after a trial court has regularly imposed a sentence and the term of court at which it is imposed has passed, the power of the trial court is at an end except for the purpose of enforcement. (*Tucker v. State*, 131 So. 327. Also see *Sawyer v. State*, 113 So. 736). The term of the County Court at which the judgment and sentence were entered on March 13th had expired before the filing of the motion and the entry of the order on April 23rd purporting to vacate the judgment and sentence and to require the county commissioners to refund to the defendant the fine and costs paid. (See Ch. 9344, Laws of 1923).

It is my opinion that the County Court was without jurisdictional power to make said order of April 23rd, and that your question is properly answered in the negative.

June 3, 1952—052-175.

COUNTY JUDGES—WARRANTS—CONVICTIONS— DISMISSALS

QUESTIONS: 1. When a warrant is issued by the County Judge on a check commonly called "worthless", which check is in an

amount less than \$50.00, and the County Judge imposes upon the defendant the duty to pay the amount of the check and the costs of the case and dismisses the case after such restitution has been made and costs paid, is the condition to pay the check and costs prior to dismissal a sufficient penalty to render the same a conviction?

2. If the above question is answered in the affirmative, would the same rule apply in cases of obtaining food and lodging with intent to defraud where the condition precedent to the dismissal of the cause imposed by the County Judge is to pay the amount of the board and lodging plus the costs in the case?

3. Would the same rule apply in other cases where the defendant is required to either make restitution or purchase licenses when such conditions are imposed by the County Judge as a precedent to the dismissal of the cause?

To: *Honorable Otis Whitehurst, Prosecuting Attorney, Sebring, Florida:*

Under the Florida Statutes, (§§921.01) "the term judgment as used in the criminal procedure law means the adjudication by the court that the defendant is guilty or not guilty."

And in many cases, the Supreme Court has held that a conviction "means that the defendant has been *adjudged* to be guilty" (Timmons v. State 97 Fla. 23, 119 So. 393; Gordon v. State, 86 Fla. 2551, 97 So. 428, etc.)

Thus, question one must be answered in the negative, since in the event of a dismissal of the cause, there has been no adjudication of guilt.

As to question two, for the reasons given in answer to question one, without an adjudication of guilt, no conviction results.

The same rule would apply in the cases cited in question three where dismissal was entered without an *adjudication of guilt*.

APPEALS

August 19, 1952—052-256.

JUDGMENT AND SENTENCE—STAY OF EXECUTION WHEN DEFENDANT APPEALS

QUESTION: Section 920.02 (4), F.S., provides that an appeal shall not operate as a supersedeas to the execution of the judgment, sentence or order complained of except upon the defendant's entering into the bond therein required. However, §924.14, F.S., provides that the execution of a sentence other than death is stayed upon the taking of an appeal. Which of these conflicting statutory provisions governs?

To: *Honorable Cecil A. Rountree, County Attorney, Chipley, Florida:*

It appears that §920.02 (4), F.S., requires a bond as a condition to the sentence being stayed, while §924.14, F.S., provides that the mere taking of an appeal shall stay the execution of the sentence, and requires no bond if the defendant remains in custody although

a bail bond is required as a prerequisite to releasing the defendant from custody pending the appeal.

Section 920.02 (4) F.S. was §239 of the 1939 Criminal Code. Section 924.14 was a subsequent provision of the same Code, viz., §293-a thereof.

Section 924.14 is consistent with §§924.21 and 924.22, F.S. I find no statutory provision with which §920.02 (4) is consistent.

Therefore, it is my opinion that §924.14, F.S., governs, rather than §920.02 (4), because, as is stated in *Johnson v. State*, 27 So. 2d 276, text 282:

"The affidavit is sufficient to authorize the search of the dwelling house which was searched under the provisions of paragraph 2 of Sec. 933.18, Fla. Statutes 1941, same F.S.A.

"It is the contention of appellant that the second paragraph of this section is of no force and effect because it is in conflict with the first paragraph of the section. We cannot follow this reasoning because it is well settled rule of construction that the last expression of the legislative will is the law in cases of conflicting provisions in the same statute or in different statutes the last in point of time or order of arrangement prevails. See 59 C.J. 999 and authorities there cited. There are exceptions to this rule, as pointed out in *Sams v. King*, 18 Fla. 557; *Hall v. State*, 39 Fla. 637, 23 So. 119; *State ex rel. v. Bessinger*, 155 Fla. 730, 21 So. 2d 343. In each of these cases it was held in effect that where the last sentence in one section of a statute is plainly inconsistent with the preceding sentences of the same section and preceding sections which conform to the legislature's obvious policy and intent such last sentence, if operative at all, must be construed as to give it effect consistent with such other sections and part of sections and with the policy they indicate. The last paragraph of Sec. 933.18, supra, is more nearly consistent with other sections of the same chapter than is the first paragraph of this section. See subparagraph (2) (b) of Sec. 933.02 and Sec. 933.07, Fla. Statutes 1941, same F.S.A. This paragraph of Sec. 933.18 is also in perfect harmony with Sec. 22 of the Declaration of Rights of the Florida Constitution.

"So our conclusion is that in so far as the provisions of the second paragraph of Sec. 933.18, supra, conflict with the provisions of the first paragraph thereof, the provisions of the second paragraph prevail."

November 14, 1952—052-313.

CIRCUIT COURT—CRIMINAL CASES—APPEALS FROM COUNTY JUDGE'S COURT—RESPONSIBILITY

QUESTIONS: (1) What officer is responsible for representing the State in the Circuit Court in criminal appeals from the County Judge's Court? (2) What privileges and responsibilities does the Prosecuting Attorney in the County Judge's Court have

in a criminal case up on appeal from the County Judge's Court to the Circuit Court? (3) What privileges and responsibilities does the State Attorney have in a criminal case up on appeal from the County Judge's Court to the Circuit Court?

To: *Honorable W. Troy Hall, County Judge of Lake County, Tavares, Florida:*

As to Question (1), §924.08 in part provides:

"... and appeals lie to circuit court in misdemeanor cases from criminal courts of records, courts of crimes, court of county judge, court of justice of the peace and county courts."

Section 26.53 provides:

"The circuit courts have exclusive original jurisdiction in all criminal cases not cognizable by inferior courts and *final appellate jurisdiction in all cases of misdemeanor arising in the criminal courts of record, the county courts, the county judge's courts, the courts of the justices of the peace and of all judgments or sentences of any municipal court.*" (Emphasis supplied)

Thus, it is established that criminal cases tried in the county judge's court are appealed to the Circuit Court.

Since Ch. 924, dealing with criminal appeals applies to all criminal appeals as set out in §924.08, *supra*, the step by step procedure as set out in Ch. 924, follows:

(a) Notice of appeal is filed with the clerk of the trial court, stating that defendant appeals from a judgment, order or sentence, as the case may be, and must be signed by defendant or his counsel (§924.11);

(b) A copy of the notice must be served upon prosecuting attorney of the trial court (§924.12);

(c) The clerk of the trial court must send a copy of the notice of appeal to the clerk of the circuit court, and to the state attorney (§924.12);

(d) Grounds of appeal must be filed in the trial court within 60 days after notice of appeal (§924.11);

(e) Within 10 days after filing of grounds of appeal the clerk of the trial court transmits to the clerk of the appellate court the appeal papers (§924.25);

(f) The appellate court then has and determines the appeal as set out in §61.07;

(g) The appeal papers are the "entire original record of the cause being appealed", as set out in §61.05.

The chapter provides (§924.40) that the appellate court may make further rules within the limitations of the statutes.

In the event no such rules have been made by the Circuit Court, the rules of the Supreme court shall apply and control. (*Caciatore v. State*, 147 Fla. 758, 3 So. (2d) 584).

Rules 11 and 12 of the Supreme Court deal with the record on appeal.

Rule 20 of the Supreme Court governs briefs, and provides that appellant's brief shall be filed within 30 days after transcript of record is filed.

With reference to question (2), it is my opinion that the State Attorney is responsible for representing the state in such appeal as the statute requires service of papers to be on the State Attorney.

In answer to question (3), it is my opinion that the prosecuting attorney in the county judge's court has neither privilege nor responsibility on appeal to the Circuit Court as such but may be associated with the State Attorney (who has all responsibilities and privileges in the Circuit Court) as an appellate counsel.

As to question (4) the State Attorney has the duty of representing the State in criminal appeals for the county judge's court to the circuit court. (§924.12, etc.)

MISCELLANEOUS PROVISIONS

May 18, 1951—051-125.

COUNTY SOLICITORS—CRIMINAL INVESTIGATIONS— FAILURE TO FILE INFORMATION

STATEMENT and QUESTIONS: At the request of the Grand Jury I respectfully request from you an opinion, in writing, as soon as possible on the following related questions on this premise:

In the event the investigation of a criminal case reaches the office of the County Solicitor, (1) by being bound over from a preliminary hearing by the Justice of the Peace to the Solicitor's office, (2) by the verdict of a coroner's jury finding the case of death to be gross negligence in the operation of an automobile upon which the Justice of the Peace instructs the Constable to take a person into custody under a charge of manslaughter, or (3) upon an independent investigation by the County Solicitor by subpoenaing witnesses and recording their testimony and thereafter the County Solicitor advises the Sheriff or the Constable, in writing, that he will not file an information in the specific case "as investigation of the facts show that the evidence does not warrant the filing of an information", and authorizes the release of the defendant, if he is in custody, or a return of his bond,

(a) What limitations are there on the discretion of the County Solicitor in deciding not to file an information, which will make his decision a criminal offense?

(b) To what extent would a written request to the County Solicitor, signed by the relatives of the deceased in a manslaughter charge arising out of an automobile collision, requesting that there be no prosecution, alter the exercise of the Solicitor's discretion?

(c) Under what circumstances would the failure of a County Solicitor to file an information constitute the violation of §925.01,

F. S., entitled "Penalty for Failure to Perform Duty Required of Officers?"

(d) Under what circumstances would the failure of the County Solicitor to file an information in such a case constitute a violation of any criminal law other than §925.01?

(e) Assuming that the failure to file information constituted a criminal offense, and assuming that the failure occurred in July 1947 during a term of office which expired in January 1949, would such criminal offense be barred by the statute of limitations when such Solicitor was elected in 1948, began his new term in January 1949 and is still in office?

(f) Assuming that failure to act did not constitute a criminal offense, but did constitute one of the grounds for removal by the Governor, would the Governor have the authority to remove such County Solicitor when the act complained of occurred in a term of office which expired before the present Governor came into Office in January 1949?

To: *Honorable Rex Farrior, State Attorney, Tampa, Florida:*
As to question (a):

The general rule as to the discretion to be exercised by a prosecuting attorney is set out in 42 Am. Jur. 1950 Supp. page 17, "Prosecuting Attorneys," §19, as follows:

"A duty rests upon a district or prosecuting attorney to prosecute the violators of the criminal laws of the state when he knows or has reason to believe to be guilty of such violations. However, this duty is not absolute, but qualified, requiring of him only the exercise of a sound discretion, which permits him to refrain from prosecuting, or having commenced a prosecution, to enter a nolle prosequi, whenever he, in good faith and without corrupt motives or influences, thinks that a prosecution would not serve the best interests of the state, or that, under the circumstances, a conviction could not be had, or that the guilt of the accused is doubtful or not capable of adequate proof."

The fact that a defendant has been bound over to the criminal court of record by a justice of the peace after a preliminary hearing or as the result of the verdict of a coroner's jury requires the county solicitor to exercise a sound discretion in determining whether to prosecute such defendant. The fact of such binding over does not, in and of itself, impose any mandatory duty upon the county solicitor to prosecute the case. It is his right to make his decision as to whether to prosecute, "according to the dictates of his own judgment and conscience uncontrolled by the judgment and conscience of any other person." *State ex rel McKittrick v. Wallach (Mo.)*, 182 S. W. 2d. 313.

If, after the county solicitor investigates the facts in a bind-over case or in a case in which he initiates an independent investigation, he concludes in good faith that the evidence does not warrant the filing of an information, his failure to file an information is not a crime, regardless of whether or not his decision accords

with what someone else might think, and even though it might appear to someone else that the county solicitor is neglecting his duty by not prosecuting.

I find no statute making it a crime for a county solicitor to neglect his duty. The result is that the common law governs. At common law, an officer is not criminally liable for failure to perform his discretionary duty unless that failure is a wilful *and* corrupt failure, or at least, a wilful *or* corrupt failure. *Ex Parte Amos*, 112 So. 289 and 114 So. 760; *State ex rel Tatham v. Coleman*, 166 So. 221; *LaTour v. Stone*, 190 So. 704; *Sullivan v. Leatherman*, 48 So. 2d. 836; 67 C.J.S. 430-431, "Officers," §133-b.

As to question (b):

The case of *Attorney General v. Pelletier* (Mass.) 134 N. E. 407, involved a proceeding brought pursuant to the laws of Massachusetts to oust Pelletier from his office as prosecuting attorney on various charges. One charge involved his failure to try a husband for adultery because the wife asked him not to try it. The Supreme Judicial Court of Massachusetts ruled that Pelletier should not be ousted on this charge, because it might be that he honestly felt that the expressed desire of the wife outweighed other considerations seemingly demanding the prosecution of her husband. In the same case, another charge involved the entry of a *nolle prosequi* in another criminal case brought against a husband for adultery, after the lawyer retained by the wife to procure a divorce for her wrote Pelletier a letter stating that he was no longer interested in said criminal case. The Court held that there was no justification for the *nolle prosequi* but ruled that Pelletier should not be ousted on this charge, because there was no evidence that he acted from a corrupt or improper motive or that he had an evil purpose.

I agree with the Massachusetts court's reasoning on this point. Therefore, I think that if a county solicitor is requested by relatives of the deceased not to prosecute manslaughter charges arising out of an automobile collision, he will be guilty of no crime if he complies with such request without any corrupt, evil or improper motive and in the honest belief that the request outweighs other considerations which might appear to demand prosecution.

As to question (c):

Section 925.01, F.S., provides as follows:

"Except as otherwise provided herein, any sheriff, constable, justice of the peace, county judge, magistrate, prosecuting attorney, court reporter, stenographer or interpreter, or other officer required to perform any duty as provided in the criminal procedure law who wilfully fails, refuses and omits to perform any duty herein required of such officer to be done and performed, or willfully violates any of the provisions hereof, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each such offense, or be imprisoned in the county jail not exceeding ten days."

Section 925.01, F.S., merely makes it a misdemeanor for an of-

ficer to wilfully fail, refuse and omit to perform any duty required of him by the Criminal Procedure Law (Chs. 901-925, F.S.), or to wilfully violate any of the provisions thereof. I find nothing in the Criminal Procedure Law regulating or in any way pertaining to the duty of a prosecuting attorney to file information. Therefore, I am of the opinion that the failure of a county solicitor to file an information cannot under any circumstances constitute a violation of §925.01.

As to question (d):

As has been pointed out in my discussion of question (a), supra, there does not appear to be any statute penalizing the failure of a county solicitor to file an information, and therefore the common law, also dealt with in said discussion, governs.

As to question (e):

In my opinion, §932.06, F.S., requires that your question be answered in the negative.

As to question (f):

After an officer begins a new term of office, he is not subject to removal for something that he did or failed to do during his preceding term. In re Advisory Opinion to Governor, 60 So. 337. However, a county solicitor's duty to prosecute violations of the law continues until the offense is barred by the statute of limitations (two years in non-capital cases), and if he goes out of office the duty devolves upon his successor. Therefore, if a non-capital crime was committed during the county solicitor's previous term of office but less than two years before the expiration of said term, and if it was his duty under the circumstances to prosecute the case, and if he neglected that duty and such neglect continued into and during his current term of office, then he would now be subject to suspension and removal for neglect of duty during his current term of office. See *State ex rel. Hardee v. Coleman*, 172 So. 222.

PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW

June 22, 1951—051-177.

MUNICIPAL COURT CONVICTIONS—APPEALS TO HIGHER COURT

QUESTION: Can an appeal to a higher court be taken from a conviction in a municipal court for violation of a municipal ordinance?

To: Mr. I. Roche, City Clerk, Vernon, Florida:

I am attaching a copy of §932.52 for your information since it provides the procedure to be followed in perfecting appeals from a municipal court to the circuit court.

In accord with the provisions of §932.52 (1), F.S., your question is answered in the affirmative.

SEARCH WARRANTS

May 17, 1951—051-121.

JUDGE OF THE COURT OF CRIMES—SEARCH WARRANTS

QUESTION: Does the Judge of the Court of Crimes of Dade County have authority to issue search warrants and make them returnable to the Criminal Court of Record of said county?

To: *Honorable Vivion B. Rutherford, Assistant County Solicitor, Miami, Florida:*

Section 933.01, F.S., specifying the officers by whom search warrants may be issued, does not mention judges of Courts of Crimes, no doubt because the statute was enacted before any Court of Crimes was created in this State. However, the statute uses the words "any judge," which indicates a legislative intent to vest the power to issue search warrants in the judges of all courts, including those which might thereafter be created, such as the Court of Crimes, as well as those which existed when the statute was enacted and were specifically named in the statute.

Moreover, §933.01 specifically confers power to issue search warrants upon a "*committing magistrate* having jurisdiction within the district where the place, vehicle or things to be searched may be." Section 901.01 provides that "*All judicial officers of this state shall be conservators of the peace and committing magistrates.*" Therefore, since the Judge of the Court of Crimes of Dade County is a judicial officer, he is a committing magistrate, and, being a committing magistrate, he has the authority to issue search warrants.

This brings us to the question of whether the judge of the Court of Crimes can make a search warrant issued by him returnable to the Criminal Court of Record. Section 933.07, F.S., provides that: "The judge or magistrate, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuance of the search warrant, shall thereupon issue a search warrant signed by him with his name of office, to any sheriff and his deputies or any constable, police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the same before the magistrate or some other court having jurisdiction of the offense."

In my opinion, the result is that the judge of the Court of Crimes of Dade County may issue search warrants and make them returnable before the Criminal Court of Record of said County whenever the said Criminal Court of Record has jurisdiction of the offense.

October 4, 1951—051-348.

CITY POLICEMEN—BEVERAGE VIOLATIONS—
MOONSHINE WHISKEY—SEARCH WARRANTS

QUESTIONS: 1. Is a search warrant needed for a city policeman to search a residence for possession of moonshine whiskey?

2. Where an establishment has a beer and wine license, is it necessary for an officer to have seen a violation of the beverage law on said premises in order for him to make a lawful search of such establishment?

3. Is it lawful for a city policeman to serve a county search warrant?

To: Honorable Charles Miller, Judge, Municipal Court, Jacksonville, Florida:

AS TO QUESTION ONE:

Except where the search is made as an incident to a lawful arrest, a search warrant is essential in order for a policeman to lawfully search a residence for moonshine whiskey. (*Gildrie v. State*, 94 Fla. 134, 113 So. 704; 47 Am. Jur. 512-513, Searches and Seizures, §16).

AS TO QUESTION TWO:

Section 562.03, F. S., provides that: "Licensees, by the acceptance of their license, agree that their places of business during business hours shall always be subject to be inspected and searched without search warrant by the supervisors and also by sheriffs, deputy sheriffs and police officers."

Because of this provision, it is not necessary for a beverage supervisor, a sheriff, a deputy sheriff or a police officer to have seen a violation of the beverage law in a place of business which is licensed to sell beer or wine in order for such officer to lawfully search such place of business during business hours.

AS TO QUESTION THREE:

Section 933.07, F. S., permits a search warrant to be issued to a "police officer" (which term includes a city policeman), and when a search warrant is so directed, §933.08 authorizes the service of the same by the police officer to whom it is directed. However, said §933.08 prohibits a city policeman from serving a search warrant which is not directed to him, except that if it is directed to some other officer (the sheriff, for example) a city policeman may aid such other officer to serve the search warrant if such other officer is present and requires such aid.

INQUESTS OF THE DEAD

February 1, 1951—051-23.

CORONER'S INQUEST—AUTOPSY—PHYSICIAN'S FEES —PAYMENT

QUESTION: Who is responsible for debts incurred by an autopsy requested by a Coroner's Jury in order to determine exact cause of death, when this service has to be from a private medical doctor?

To: Honorable A. Hagan Parrish, Sheriff, Polk County, Bartow, Florida:

I believe that §936.17, F. S., answers your question.

INTERSTATE EXTRADITION OF WITNESSES

June 20, 1952—052-195.

CRIMINAL PROSECUTION—OUT-OF-STATE WITNESSES
—MILEAGE—PER DIEM

QUESTION: In criminal prosecution, are witnesses who reside outside the State of Florida entitled to their actual mileage in addition to the per diem which is allowed by law?

To: *Honorable Jess Mathas, Clerk Circuit Court, Volusia County, DeLand, Florida:*

Prior to the adoption of the Uniform Interstate Extradition of Witnesses Act (Ch. 20458, Laws of 1941; Ch. 942, F.S.), there were no effective means by which witnesses residing outside the State of Florida could be compelled to attend and testify in trial of criminal causes in this state. Chapter 942, *supra*, provided the machinery whereby the judge of the court where the case was pending, or the grand jury investigation was commenced, could make a determination that the testimony of some witness without this state was material and issue a certificate reciting the facts and specifying the number of days the witness would be required. This certificate is then presented to a judge of a court of record in the county where the witness is found.

If the witness is then compelled to attend and testify in a criminal proceeding or investigation in this state, it is required that he be tendered the sum of 10¢ a mile by the ordinary travel route to and from the court where the prosecution is pending and \$5.00 for each day that he is required to travel and attend as a witness. Section 942.03 (2), F.S.

However, the provisions of Ch. 942 are not brought into play unless and until a proper certificate has been issued by the judge under the seal of the court. Therefore, there would be no lawful authority for the payment of the travel allowance of 10¢ per mile and the per diem of \$5.00 unless such certificate had been issued.

Where the out-of-state witness appears and testifies voluntarily, it is my opinion that it would not be proper to pay the travel allowance or per diem except upon order of the court fixing the amount of travel expense to be allowed and per diem.

CHAPTER XLVI

CORRECTIONAL SYSTEM

PAROLE

February 19, 1952—052-45.

FLORIDA BOARD OF PARDONS—FELONY CONVICTIONS—NONRESIDENT STATE—CIVIL RIGHTS—RESTORATION

QUESTION: May an individual convicted of a felony in Connecticut and deprived of his civil rights within this state, have such civil rights restored by the Florida Board of Pardons?

To: Honorable George W. Leaird, State Senator, Ft. Lauderdale, Florida:

Civil rights are taken away from persons convicted of felonies in other states by virtue of certain sections of the Florida Statutes. See 97.041, F.S. (qualifications of electors), which specifically refers to convictions in other states; §40.01 and 40.07, F.S. (jury service), which have been construed to cover out-of-state convictions of certain crimes, (*Duggar vs. State*, 43 So. 2d. 860); §112.01, F.S. (disqualifications for office), which does not expressly cover out-of-state convictions but which would probably be so construed as to certain crimes in light of the *Duggar* case, *supra*.

Since the loss of civil rights in Florida results from the operation of the Florida laws based upon the fact of conviction in another state, rather than because of the loss of civil rights in such other state, it is immaterial whether or not a pardon granted by the convicting state is present in a case or not, unless such pardon has the effect of wiping out the fact of the prior conviction, as hereafter discussed.

Our research into this question indicates that the Florida Board of Pardons apparently has no authority to restore civil rights in this state when they have been deprived a person because of a conviction in another state. Only if a pardon granted by the convicting state wipes out the fact of the prior conviction might it have the effect of restoring civil rights in Florida, and in the instant case an examination of the Connecticut statutes indicates that their pardons do not have such effect.

This being true, then, it is my opinion that the Florida Board of Pardons is unable to restore the civil rights of an individual in Florida when such rights have been deprived him because of his conviction of a felony in Connecticut. You will note that this conclusion is contrary to that expressed by my predecessor in office in his opinion 042-427, dated August 28, 1942 (*See Biennial Report of the Attorney General, 1941-42* (question 2), pages 784, 785). In that opinion he held that the power of the State Board of Pardons to "remit fines and forfeitures" was broad enough to permit the

State Board to restore civil rights lost as a consequence of a conviction of a criminal offense in another state. While there is considerable merit in the views expressed in the aforementioned opinion of my predecessor, the Board of Pardons has never followed that opinion and has consistently declined to take action in such cases, believing that it does not have such authority. Therefore, even were this prior opinion to be technically correct, I do not think the Board of Pardons would now change its longstanding policy.

It seems that the only way whereby a person convicted of a felony in Connecticut may have his civil rights restored in Florida is through a special act of the legislature. This has been done in similar cases in the past—e.g., Ch. 23620, Laws of 1947, which restored full civil rights to an individual who similarly had been convicted of a felony in the state of Connecticut. Hence, legislative action would appear to be the most expeditious manner, if not the only method, of accomplishing the desired result.

COUNTY AND MUNICIPAL CONVICTS

May 22, 1951—051-133.

SHERIFF'S DUTIES—CONVICTS IN COUNTY JAIL— WORK—FOOD—HOUSING

QUESTION: Where a person has been convicted and sentenced by the court of record of Escambia County to serve time on the county road, may the sheriff refuse to house and feed such prisoner in the county jail, and require the county commissioners to keep such prisoner in the county road camp?

To: *Honorable R. L. Kendrick, Sheriff, Escambia County, Pensacola, Florida.*

In order to properly analyze the question you present, it is necessary to refer to the provisions of several sections of the Florida Statutes. Sections which appear pertinent to this problem are 922.01, 922.05 (2), 951.01, 951.05 and 951.12.

An examination of the above statutes indicates that the authorization to the county commissioners to work convicts on the roads of the county is permissive in form rather than mandatory. In each statute the general phrase is that the board of county commissioners "may employ," or that persons "may be worked on the road"; even in §922.05, which authorizes the court to sentence a prisoner to hard labor, the wording is "he may be employed at such manual labor as the county commissioners may direct."

Referring again to §922.01, it may be argued that under this particular section the sheriff is not the proper official to execute the sentence of "time on the county road" where county road camps are available. However, it is my opinion that the authority of the sheriff to transfer a prisoner contained in this section refers to the transfer of a prisoner to the state prison, the industrial school for boys, or other recognized correctional institution where the particular sentence is to be executed. The county road camps are in a different category; they are merely adjuncts to the county jail, established by the county commissioners to facilitate the working of prisoners on the roads, where so desired by the commissioners.

Accordingly, while it would seem that the county commissioners ordinarily would cooperate with the sheriff, and assume custody of prisoners sentenced to "time on the county road" by keeping such prisoners in the county road camps, it appears that the county commissioners have sole discretion in the matter. Hence, I doubt if they can be required to take custody of prisoners committed to the county jail, since the working of any prisoner on the roads, whether it be part of his sentence or not, does not seem by statute to be mandatory upon the county commissioners. It is reasonable to assume that this authority was deliberately made discretionary, so that the commissioners would not be required to work prisoners on the road when there is no useful work to be done, when a prisoner might be physically unable or otherwise incapacitated to perform labor, or when, for any other reason, the commissioners do not deem it prudent to so employ prisoners on the road at any particular time.

Therefore, it is my opinion that your question must be answered in the negative.

October 5, 1951—051-351.

SHERIFFS—CONVICTED PRISONERS—WORK IN JAIL— PREPARATION OF FOOD

STATEMENT: It is true that my Opinion No. 051-268 dealt with the authority to work prisoners under Ch. 951, F.S. However, Question 3 dealt with in said Opinion specifically involved the authority of the sheriff to work prisoners "in jail or court house yard" and, in my answer to that question I negated the theory that a sheriff has the authority to work a prisoner either inside or outside of the jail.

To: *Honorable Edward S. Hemphill, Attorney for the Sheriff of Duval County, Jacksonville, Florida:*

I agree with you that the sheriff has the inherent right to require convicted prisoners to clean up the jail and keep it sanitary, and I recede from anything in my Opinion No. 051-268 which might cast an implication to the contrary.

However, I cannot agree with your opinion to the sheriff that he has an inherent right to require convicted prisoners to prepare food. The sheriff is paid for feeding prisoners and it is his duty to prepare the food or have it prepared at his own expense, and I don't think that he has any right to require prisoners to enhance his profit by doing the work of preparing the food.

As to the "other kindred tasks" mentioned in your opinion to the sheriff, I don't know what you had in mind and, therefore, I cannot express an opinion in regard thereto. Offhand, I do not think of any task, other than cleaning the jail and keeping it sanitary, which the sheriff has the inherent right to have a convicted prisoner perform.

As to those tasks in or about the jail which the sheriff has no authority to require prisoners to perform, I know of no reason why a convicted prisoner may not voluntarily perform any such task if he is willing to perform it of his own free will. Oftentimes a prisoner is glad of the opportunity to get out of his cell and work at a

task which will occupy his time and keep his mind and hands busy, and I think that he has the right to do so at the sheriff's request and under the sheriff's supervision. It is hardly necessary to say that his "willingness" must not be obtained by pressure or coercion and must be entirely voluntary.

December 29, 1952—052-338.

PRISONERS—FINE AND COSTS—GAIN TIME— COMPUTATION

QUESTION: Where a defendant is sentenced to pay a fine and, in default of such payment, to serve a stipulated term in the county jail, and where, after serving a part of said term, with good conduct, he wishes to pay the fine and obtain his release, what is the proper method of computing the amount to be paid by him?

To: Honorable Willis V. McCall, Sheriff, Lake County, Tavares, Florida:

Section 951.16, F.S. provides as follows:

"951.16, Prisoners entitled to receive credit on fine based on imprisonment. Every person who may be imprisoned in the county jail for failure to pay a fine and costs, or either, under sentence imposed, upon conviction for crime shall be entitled to receive, together with subsistence, a credit on such fine and costs, or either, as the case may be, in proportion to the time such person may be imprisoned."

And §954.06, F.S. provides that when no charge of misconduct has been sustained against a prisoner, he shall be entitled to stated deductions for gain time, the amount of time to be taken off the first year of the sentence being five days per month. Said statute says that:

"Where no charge of misconduct is sustained against a prisoner, the deduction shall be deemed earned and the prisoner shall be entitled to credit for a month as soon as the prisoner has served such time or, when added to the deduction allowable, will equal a month."

(Gain time earned by a prisoner may, of course, be afterwards forfeited under another provision of this statute for specified kinds of misconduct.)

Under this statute, a county prisoner is not entitled to gain time on a pro rata basis; he must have served enough time to entitle him to gain time for a month in order to be entitled to any gain time at all.

Let us apply the above cited statutes to the case mentioned in your letter, where the defendant was sentenced to pay a \$60 fine and, in default of such payment, to serve 60 days in the county jail, and where he wishes to pay up and obtain his release after serving 20 days with good conduct. He would be entitled, under §951.16, to a credit of 20/60 of his fine, or \$20, and would have to pay the

\$40 balance in full because he would not be entitled to any pro rata credit for gain time.

But, let us suppose that said defendant has served 40 days and that his conduct has been good. In most instances, it is fair to the prisoner to regard 30 days as a month and so I treat 30 days as a month for the purposes of this computation. Under these facts, when the prisoner has served 25 days he is entitled to five days for gain time, or a total of 30 days. In addition, he is entitled to credit for the other 15 days served, without any gain time thereon. Adding the 30 days and the 15 days together, we find him entitled to credit for 45 days, which is 45/60 of the alternative 60-day sentence. Consequently, he is entitled to credit for 45/60 of \$60, or \$45, and must pay only the balance of \$15 to obtain his release.

STATE CONVICTS

August 2, 1951—051-256.

STATE PRISONERS—GAIN TIME—WORK AS COOK— REQUIREMENTS

QUESTION: May a state prisoner be required to work as a cook more than 60 hours a week if he is granted an additional gain time credit of one day per week as an inducement?

To: *Honorable Nathan Mayo, Commissioner of Agriculture:*

It appears from your letter that it is difficult to secure enough prisoners having knowledge of cooking to supply the prison camps and institutions, because of the scarcity of prisoners who have a knowledge of cooking, and that it is therefore desirable, if the law will permit, to work out a plan whereby a prisoner who is a cook can be worked more than 60 hours per week.

Section 952.08 states that: "No state convict shall be required to work more than sixty hours in any one week or more than eleven hours in any one day." Because of this statute, I do not think that there is any lawful way that a prisoner can be required to work more than 60 hours per week, as a cook or otherwise, even though, as an inducement, he should be offered credit on his sentence of one day per week in addition to the gain time allowed by statute.

Moreover, it is my opinion that neither you nor the Board of Commissioners of State Institutions can lawfully give a prisoner any gain time in excess of that specified by §954.06, which controls the allowance of gain time.

I have not been able to discover any law or theory which would justify requiring a prisoner to work more than 60 hours per week.

STATE PRISON FARM

August 20, 1951—051-281.

PEACE OFFICERS—PRISON CAMPS—ESCAPEE— USE OF DOG BOY

QUESTION: May a highway patrolman, sheriff or other of-

ficer lawfully be permitted to take from a state convict camp or other state institution, and from the control of the persons in charge of such camp or institution, a Dog Boy (a prisoner who is in charge of the dogs) to go along with the dogs belonging to the camp or institution, for the purpose of running down an escapee?

To: Honorable Nathan Mayo, Commissioner of Agriculture, Prison Division:

I think that it is a matter of discretion with the Board of Commissioners of State Institutions as to whether to permit the use of prisoners who are dog boys by highway patrolmen, sheriffs and other peace officers in running down escapees.

I believe that the matter should be regulated by rules adopted by said Board. It is my opinion that it is within the power and authority of the said Board to promulgate rules under which a highway patrolman, sheriff or other peace officer may be permitted to take from a state convict camp or other state institution, and from the control of the persons in charge of such camp or institution, dog boys to go along with the dogs belonging to the camp or institution for the purpose of running down escapees.

In my opinion, any such rules should provide that only dog boys who are trustees may be thus used to assist in running down escapees, and should provide that whenever practicable, a dog boy should be accompanied by a prison guard when taken on such a mission; further, that any such rules should provide that no dog boy may be used to hunt escapees without the free and voluntary consent of such dog boy.

August 29, 1951—051-290.

STATE PRISON INDUSTRIAL TRUST FUND — RAIFORD— RAW MATERIALS—INDUSTRIAL PLANTS

QUESTION: What is included in the phrase "raw materials necessary and proper in the manufacture of products in the industrial plants at the state prison," as used in Ch. 26992, Laws of 1951 (§954.51, F.S.)?

To: Honorable C. M. Gay, State Comptroller:

Chapter 26992 (§954.51, F.S.) is entitled "An Act to Create an Industrial Trust Fund for the State Prison at Raiford, Appropriating funds therefor . . . Authorizing Use of and Disbursements from such fund . . ." Section one of the said act provides that there is "created a State Prison Industrial Trust Fund, available for the purpose of purchasing raw material for manufacture in the plants of the state prison . . ." and Section three that "the fund shall be used for the purchase of raw materials necessary and proper in the manufacture of products in the industrial plants at the state prison." Prior to the establishment of this industrial revolving fund raw materials were purchased from the appropriation to the state prison contained in the General Appropriations Acts. Provision for the purchase of such raw materials was made in the budget submitted to the state budget commission and by it submitted to the Legislature.

The budget submitted to the state budget commission for the operation of the state prison for the current biennium contained the following items which we are informed were intended to provide for the purchase of materials for the industrial plants at the state prison, to wit, "Fibre and Textile Products . . . \$104,370.00," "Other Materials . . . \$126,005.00," and "Hand Tools and Minor Equipment . . . \$11,500.00." The appropriation for expenses made to the state prison for the 1949-1951 Biennium was \$731,828.00, but the appropriation made for the same purpose for the 1951-1953 biennium was only \$586,410.00. The state budget commission recommended the sum of \$773,555.00 for the said 1951-1953 biennium. It is thought that the Legislature when it reduced the amount of the appropriation recommended by the budget commission intended to delete the above mentioned items, or the portion of them intended for the purchase of materials used in the manufacture of products by the industrial plants of the prison, because of having set up the said "Industrial Trust Fund." We think that the Legislature intended that the said Industrial Trust Fund be used for the purchase of raw materials instead of the said items formerly included in the appropriation to the institution. The statute should be construed in the light of these operations. The pole star of statutory construction is the ascertainment of the intention and purpose of the Legislature. (59 C. J. 948 et seq., §568 et seq.)

"The word 'material' is defined as meaning the substance or matter of which anything is made; the substance or substances, or the parts, goods, stock or the like of which anything is composed or may be made; something that becomes a part of the finished structure; something that goes into and forms a part of the finished structure; . . . such goods, wares and merchandise as may be furnished for, or intended to enter into and become directly or indirectly a part of, the completed improvement." (57 C. J. S. 449). The term has been held to exclude tools, machinery, and appliances only used for the purpose of facilitating the work but which is not incorporated into the thing manufactured (57 C. J. S. 449). Although some of the earlier cases indicate that "raw materials" were materials in their natural state, the more recent cases recognize that there may be manufacture even though the materials used may be themselves manufactured products (55 C. J. S. 681, §3). The materials entering into a particular finished product of modern manufacture may pass through many stages of manufacture before the said finished product is ultimately produced. The complicated structure of modern manufacturing is such that very few manufacturers create out of an original raw material a finished product ready for the consumer. It is a familiar fact that that which is the finished product of one manufacturer becomes the raw material of another. (55 C. J. S. 681, §3). Leather to the tanner is a finished product but a raw material to a shoe manufacturer.

Although the case of *Jenkins Hardware Company v. Globe Indemnity Company*, 205 N. C. 185, 170 S. E. 643, text 645, is not in point it may be helpful by analogy. In that case the surety had underwritten the payment of road materials purchased by the contractor. It was held that road materials consisted of other items than the rock, sand and cement used to build the road. The court referred to an earlier North Carolina case in which it was held that material "is something that is consumed in the use, as coal, for in-

stance, or labor performed, . . . or is such material as goes into and makes a part . . . of the product, in such a way as to be indistinguishable from the mass."

We feel that the raw materials going into the production of processed tobacco includes not only the raw tobacco but also the several flavoring, bonding and sweetening materials used in its processing. The materials going into the production of motor vehicle tags include not only the steel used but also the painting and enameling materials, including paint thinners and mixing materials, and correction materials for correcting errors in the numbering and painting of tags. The materials going into production of clothing, such as bolt goods, elastic, banding, webbing, buttons and thread should be considered as raw materials.

We also feel that packing supplies for manufactured or processed tobaccos, such as smoking tobacco boxes, chewing tobacco cartons, and the like, as well as materials for sealing such boxes and cartons, should be included as raw materials used in the manufacture or processing of tobacco. It is doubted that cigarette papers are to be considered as raw materials when given with boxes of smoking tobacco, but would be in case the industrial department of the prison should manufacture cigarettes. Paper necessary to slip between motor vehicle tags to prevent sticking, as well as shipping cartons, would also seem to be sufficiently connected with the manufacturing process as to be considered as a part of the materials used in manufacture. Although packing crates do not become a part of the manufactured materials they are a necessity for handling and shipping.

We do not think that machinery and parts for the repair thereof, and which do not become a part of the manufactured products, are to be considered as materials used in manufacturing. They are in the nature of capital investment. Since there is a conflict of authorities as to whether electricity used for the operation of the machines is a raw material, we do not make a decision on this question at this time, as there are probably sufficient funds in the general appropriation for the payment for electricity used.

The above authorities and observations seem to answer the above question as well as the same may be answered by this office.

1952 CONSTITUTIONAL AMENDMENT

The 1951 Legislative Session provided that eleven proposed amendments to the Florida Constitution be submitted to the electors at the general election in 1952. Only one of these proposed amendments were adopted and ten were defeated. So far as I am advised there have been no court decisions affecting this amendment since its adoption. The language of the new amendment is set out below.

Article XII

SECTION 18 (a) That beginning January 1, 1953, and for thirty (30) years thereafter, the first proceeds of the revenues derived from the licensing of motor vehicles to the extent necessary to comply with the provisions of this amendment, shall, as collected, be placed monthly in the County Capital Outlay and Debt Service School Fund in the State Treasury, and used only as provided in this Amendment. Such revenue shall be distributed annually among the several counties in the ratio of the number of instruction units in each county in each year computed as provided herein. The amount of the first revenue derived from the licensing of motor vehicles to be set aside in each year and distributed as provided herein shall be an amount equal in the aggregate to the product of four hundred (\$400.00) dollars multiplied by the total number of instruction units in all the counties of Florida. The number of instruction units in each county in each year for the purposes of this Amendment shall be the greater of (1) the number of instruction units in each county for the school fiscal year 1951-52 computed in the manner heretofore or hereafter provided by general law, or (2) the number of instruction units in such county for the preceding school fiscal year computed in the manner heretofore or hereafter provided by general law and approved by the State Board of Education (hereinafter called the State Board).

Such funds so distributed shall be administered by the State Board as now created and constituted by Section 3 of Article XII of the Constitution of Florida. For the purposes of this Amendment, said State Board, as now constituted, shall continue as a body corporate during the life of this Amendment and shall have all the powers provided in this Amendment in addition to all other constitutional and statutory powers related to the purposes of this Amendment heretofore or hereafter conferred upon said Board.

(b) The State Board shall, in addition to its other constitutional and statutory powers, have the management, control and supervision of the proceeds of the first part of the revenues derived from the licensing of motor vehicles provided for in subsection (a) hereof. The State Board shall also have power, for the purpose of obtaining funds for the use of any County Board of Public Instruction in acquiring, building construction, altering, improving, enlarging, furnishing, or equipping capital outlay projects for school purposes, to issue bonds or motor vehicle tax anticipation certificates, and also to issue such bonds or motor

vehicle tax anticipation certificates to pay, fund or refund any bonds or motor vehicle tax anticipation certificates theretofore issued by said State Board. All such bonds shall bear interest at not exceeding four (4) per centum per annum and shall mature serially in annual installments commencing not more than three (3) years from the date of issuance thereof and ending not later than January 1, 1983, and each annual installment shall not be less than (3) per centum of the total amount of the issue. All such motor vehicle tax anticipation certificates shall bear interest at not exceeding four (4) per centum per annum and shall mature prior to January 1, 1983. The State Board shall have power to determine all other details of said bonds or motor vehicle tax anticipation certificates and to sell at public sale after public advertisement or exchange said bonds or motor vehicle tax anticipation certificates, upon such terms and conditions as the State Board shall provide.

The State Board shall also have power to pledge for the payment of the principal of and interest on such bonds or motor vehicle tax anticipation certificates, including refunding bonds or refunding motor vehicle tax anticipation certificates, all or any part from the anticipated revenues to be derived from the licensing of motor vehicles provided for in this Amendment and to enter into any covenants and other agreement with the holders of such bond or motor vehicle tax anticipation certificates at the time of the issuance thereof concerning the security thereof and the rights of the holders thereof, all of which covenants and agreements shall constitute legally binding and irrevocable contracts with such holders and shall be fully enforceable by such holders in any court of competent jurisdiction.

No such bonds or motor vehicle tax anticipation certificates shall ever be issued by the State Board until after the adoption of a resolution requesting the issuance thereof by the County Board of Public Instruction of the county on behalf of which such obligations are to be issued. The State Board of education shall limit the amount of such bonds or motor vehicle tax anticipation certificates which can be issued on behalf of any county to seventy-five (75) per cent of the amount which it determines can be serviced by the revenue accruing to the county under the provisions of this Amendment. All such bonds or motor vehicle tax anticipation certificates shall be issued in the name of the State Board of Education but shall be issued for and on behalf of the County Board of Public Instruction requesting the issuance thereof, and no election or approval of qualified electors or freeholders shall be required for the issuance thereof.

(c) The State Board shall in each year use the funds distributable pursuant to this Amendment to the credit of each county only in the following manner and order of priority:

(1) To pay all amounts of principal and interest maturing in such year on any bonds or motor vehicle tax anticipation certificates issued under the authority hereof, including refunding bonds or motor vehicle tax anticipation certificates, issued on behalf of the Board of Public Instruction of such county; subject, however, to any covenants or agreements made by the State Board concerning the rights between holders of different issues of such bonds

or motor vehicle tax anticipation certificates, as herein authorized.

(2) To establish and maintain a sinking fund or funds to meet future requirements for debt service, or reserves therefor, on bonds or motor vehicle tax anticipation certificates issued on behalf of the Board of Public Instruction of such county, under the authority hereof, whenever the State Board shall deem it necessary or advisable, and in such amounts and under such terms and conditions as the State Board shall in its discretion determine.

(3) To distribute annually to the several Boards of Public Instruction of the counties for use in payment of debt service on bonds heretofore or hereafter issued by any such Board where the proceeds of the bonds were used, or are to be used, in the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects in such county, and which capital outlay projects have been approved by the Board of Public Instruction of the county, pursuant to a survey or surveys conducted subsequent to July 1, 1947 in the county, under regulations prescribed by the State Board to determine the capital outlay needs of the county.

The State Board shall have power at the time of issuance of any bonds by any Board of Public Instruction to covenant and agree with such Board as to the rank and priority of payments to be made for different issues of bonds under this Subsection (3), and may further agree that any amounts to be distributed under this Subsection (3) may be pledged for the debt service on bonds issued by any Board of Public Instruction and for the rank and priority of such pledge. Any such covenants or agreements of the State Board may be enforced by any holders of such bonds in any court of competent jurisdiction.

(4) To distribute annually to the several Boards of Public Instruction of the counties for the payment of the cost of the construction, acquisition, improvement, enlargement, furnishing, or equipping of capital outlay projects for school purposes in such county as shall be requested by resolution of the County Board of Public Instruction of such county.

(5) When all major capital outlay needs of a county have been met as determined by the State Board, on the basis of a survey made pursuant to regulations of the State Board and approved by the State Board, all such funds remaining shall be distributed annually and used for such school purposes in such county as the Board of Public Instruction of the county shall determine, or as may be provided by general law.

(d) Capital outlay projects of a county shall be eligible to participate in the funds accruing under this Amendment and derived from the proceeds of bonds and motor vehicle tax anticipation certificates and from the motor vehicle license taxes, only in the order of priority of needs, as shown by a survey or surveys conducted in the county under regulations prescribed by the State Board, to determine the capital outlay needs of the county and approved by the State Board; provided, that the priority of such projects may be changed from time to time upon the request of the Board of Public Instruction of the county and with the approval of the State Board; and provided further, that this Sub-

section (d) shall not in any manner affect any covenant, agreement, or pledge made by the State Board in the issuance by said State Board of any bonds or motor vehicle tax anticipation certificates, or in connection with the issuance of any bonds of any Board of Public Instruction of any county.

(e) The State Board may invest any sinking fund or funds created pursuant to this Amendment in direct obligations of the United States of America or in the bonds or motor vehicle tax anticipation certificates, matured or to mature, issued by the State Board on behalf of the Board of Public Instruction of any county.

(f) The State Board shall have power to make and enforce all rules and regulations necessary to the full exercise of the powers herein granted and no legislation shall be required to render this Amendment of full force and operating effect from and after January 1, 1953. The Legislature shall not reduce the levies of said motor vehicle license taxes during the life of this Amendment to any degree which will fail to provide the full amount necessary to comply with the provisions of this Amendment and pay the necessary expenses of administering the laws relating to the licensing of motor vehicles, and shall not enact any law having the effect of withdrawing the proceeds of such motor vehicle license taxes from the operation of this Amendment and shall not enact any law impairing or materially altering the rights of the holders of any bonds or motor vehicle tax anticipation certificates issued pursuant to this Amendment or impairing or altering any covenant or agreement of the State Board, as provided in such bonds or motor vehicle tax anticipation certificates.

The State Board shall have power to appoint such persons and fix their compensation for the administration of the provisions of this Amendment as it shall deem necessary, and the expenses of the State Board in administering the provisions of this Amendment shall be prorated among the various counties and paid out of the proceeds of the bonds or motor vehicle tax anticipation certificates or from the funds distributable to each county on the same basis as such motor vehicle license taxes are distributable to the various counties under the provisions of this Amendment. Interest or profit on sinking fund investments shall accrue to the counties in proportion to their respective equities in the sinking fund or funds.

1951 ENACTMENTS OF GENERAL INTEREST

Sections *8.01, 8.04, or chapter **26717, create two new congressional districts, making total of eight.

* Reference to sections relates to sections of Florida Statutes.

** Reference to chapter following sections relates to Laws of Florida, Acts of 1951.

Sections 16.19-16.24 and 16.27-16.29, or chapter 26484, adopt as statute law Volume I, Florida Statutes, 1951; authorized inclusion of 1951 General Laws therein and correct and repeal various sections of said Statutes.

Section 18.111, or chapter 26983, accepts as collateral security for any funds administered by him, any bonds, notes or certificates issued by any county or state instrumentality which are pledged or payable from the surplus second gasoline tax authorized under §16, Article IX.

Sections 28.241 and 34.041, or chapter 26931, provide a flat filing fee for actions in circuit or county court as compensation for clerks of said courts.

Sections 39.01-39.20, or chapter 26880, create juvenile court in each county and prescribes for a uniform procedure therein.

Section 40.01, or chapter 26514, requiring jurors to be qualified electors of county.

Section 40.01, or chapter 26581, providing that persons convicted of certain crimes within or outside state or of crime which would be felony if convicted in this state, as ineligible as juror unless civil rights restored.

Sections 40.01, 40.07, or chapter 26848, relating to qualifications of jurors convicted of or under prosecution for certain crimes.

Sections 42.01-42.22, or chapter 26920, establishing a small claims court in each county and providing for activation and procedure therein.

Section 45.11, or chapter 26541, providing that no action shall die with the person but same may be maintained in name of personal representative or other person designated by law.

Section 64.14, or chapter 26916, allowing circuit judge to assess damages upon dissolution of injunction where there is no request for jury trial for damages.

Section 72.40, or chapter 26840, regulates placement of children for adoption and prohibits the sale of children and the assigning or transfer of parental rights and duties.

Section 92.032, or chapter 26842, providing method for introduction into evidence of copies of official foreign records and documents.

Section 92.33, or chapter 26482, requires persons taking or possessing written statements of accident victims to furnish a copy of the statement to said accident victims and prohibits use as evidence unless such copies have been furnished.

Section 92.35, or chapter 26901, provides for admission into evidence of photographic copies of business and public records.

Section 95.37, or chapter 26953, creates a limitation on time to present claims to the legislature and provides that all relief acts be for payment in full.

Chapters 97-104, F.S. or chapter 26870, revise the election laws.

Sections 99.161, 104.27, or chapter 26819, regulate contributions and expenditures in political campaigns.

Section 120.09, or chapter 26854, prescribing grounds for disqualification of persons in official capacity and method of filling temporary vacancy.

Section 125.08, or chapter 27198, providing that certain county contracts to be let only by competitive bids.

Section 125.43, or chapter 26731, allowing boards of county commissioners to contract with other boards for economy and efficiency in carrying out similar functions.

Section 125.45, or chapter 26947, relates to sheriffs' offices and jails and the expense of equipping and operating same and authorizes the county commissioners to pay or furnish certain services, and equipment for same.

Sections 129.01-129.03, 129.05-129.07, or chapter 26874, establishes a budget commission for boards of county commissioners and prescribes methods of preparing and adopting budgets, levying taxes, making expenditures and accounting for funds under the control of said board.

Section 165.01, or chapter 26913, changes number of inhabitants necessary to incorporate a municipality from 25 to 150.

Sections 184.01-184.20, or chapter 26919, confers additional powers upon municipalities in relation to collection, treatment and disposal of sewage.

Section 192.121, or chapter 26899, limiting homestead exemption to persons of one year's residence.

Section 193.111, or chapter 26771, authorizes the county commissioners to cause appraisal of all property in the county to be made by same company or board of appraisers to be selected by them.

Sections 209.001-209.24, or chapter 26718, revise the law relating to the levy, collection and distribution of tax on motor fuels, other than gasoline.

Section 210.21, or chapter 26813, relates to ad valorem tax millage and assessed valuations in municipalities where a tax on cigarettes is levied by such municipalities.

Sections 212.02-212.04, 212.06, 212.08, 212.11, 212.12, 212.15, or chapter 26871, revise the "sales tax" law by eliminating certain exemptions and adding others, providing rates and methods of reporting and remitting such taxes and prescribe penalties.

Section 230.23, (13), or chapter 26775, creates school tax areas for issuing bonds; capital outlay for building schools.

Section 230.25, or chapter 26902, requires a four year Florida graduate certificate for county superintendent of public instruction as qualification to hold office.

Section 231.17, 231.20, 231.24, 231.30, or chapter 26894, to make statute conform with state board rules in re certification of school personnel.

Sections 242.62 and 242.63 or chapter 26763, appropriating money to be paid to the first approved and accredited medical school established in Florida for each qualified Florida student enrolled.

Sections 252.01-252.29, or chapter 26875, establish a civil defense agency.

Section 253.12, or chapter 26776, vesting title to sovereignty tideland in state to be held by the trustees of the internal improvement fund.

Section 317.27 (2), or chapter 26950, provides that rights of overtaken vehicle shall give way to the right in favor of overtaking vehicle.

Section 317.38, or chapter 26719, provides specifications for loading or constructing vehicles using hand or arm traffic signals and requires direction signals for vehicles not meeting such specifications.

Section 317.97, or chapter 26844, prohibits use of television sets in motor vehicles when such sets are in view of driver.

Section 320.01, or chapter 26923, defining which motor vehicles are to be considered "for hire."

Section 320.07, or chapter 26544, extending time of sale of motor vehicle license to January 5th and sets February 20th as deadline to operate vehicle without current license.

Section 320.084, or chapter 26839, authorizing issuance of free license plates to disabled veterans who are residents of this state and who acquired a motor vehicle through financial assistance by the veterans administration of the federal government.

Section 322.18, or chapter 26911, relating to expiration and renewal of driver's licenses and provides additional time within which military personnel may renew said licenses.

Sections 323.15, 323.16, or chapter 26663, amended said sections to lower mileage tax on trucks to the 1945 rate to conform with 1945 amendment which raised rate for a two year period; provides redistribution of moneys collected from auto transportation companies.

Section 341.81, or chapter 26822, declaring all roads and streets constructed from public funds as state roads and providing that this section is not effective as to the no fence law until the state road department has accepted, paved and maintained same.

Section 342.02, or chapter 26725, authorizing expenditures for roadside beautification, information centers and development.

Section 344.261, or chapter 26954, requiring state road department to secure approval of board of administration before entering into lease purchase agreements.

Section 347.08, or chapter 26493, divesting Florida Railroad and Public Utilities Commission of jurisdiction over county or city owned toll bridges.

Section 348.10, or chapter 26984, authorizing construction of fishing walks on bridges.

Section 361.05, or chapter 26893, allowing certain natural gas companies right of eminent domain.

Section 364.31, or chapter 26720, regulates illegal use of communication services for gambling purposes, and regulates public utilities furnishing communication service and facilities and requiring public utilities to report if any of its facilities are being used illegally.

Sections 365.01, 365.04, 365.08, or chapter 26820, relate to private wire service, providing for loss of same for certain unlawful uses, and hearing on discontinuance of said services.

Sections 366.01-366.13, or chapter 26545, provide for regulation of certain privately owned electric or gas public utilities by Railroad and Public Utilities Commission.

Section 372.57, or chapter 26943, setting nonresident fishing license at \$10.00.

Section 372.57, or chapter 26944, setting nonresident fishing license for fourteen days only at \$3.00.

Sections 392.25-392.36, or chapter 26828, provide the procedure for compulsory treatment of tuberculosis victims.

Sections 396.07-396.17, or chapter 26817, establish state hospital for the care and treatment of chronic alcoholics in Highlands County, and providing for an appropriation out of the additional alcoholic beverage tax.

Chapter 409, F.S., or chapter 26937, reorganizes and redesignates the state board of public welfare for the administration of public assistance and welfare programs in the state into department of public welfare.

Section 409.37, or chapter 26853, relates to public assistance and state welfare programs and excludes certain personal property from being calculated as resources of persons receiving welfare.

Section 440.12, or chapter 26876, relates to the amount of compensation payable for disability under the terms of the workmen's compensation act.

Section 440.15, or chapter 26877, extends benefit period of payments for permanent total disability under workmen's compensation law.

Section 440.16, or chapter 26966, relates to compensation and other benefits payable for death under workmen's compensation act and omits the provision which relates to a deceased employee leaving no widow or widower or no dependents whose compensation benefits shall become a part of the administrative fund of the Industrial Commission.

Section 440.39, or chapter 26546, relates to the payment of workmen's compensation benefits where the employee is injured or killed by the negligence or wrongful act of a third party tortfeasor and providing for actions at law and other remedies against such third parties.

Sections 443.03, 443.05, 443.07, 443.09, 443.15, 443.16, 443.22, or chapter 26879, relate to definitions, benefits, rights, recovery and recoupment of illegal benefits, contributions, experience rating, election and termination of coverage, collections of contributions, attorney fees and fraud penalties under the "unemployment compensation law."

Sections 443.03, 443.08, or chapter 26878, relate to employing units, transfer of employment experience of employers and contribution rate of certain employers under "unemployment compensation law."

Section 443.04, or chapter 26801, relates to payment of benefits by increasing the maximum amount and duration of benefits under "unemployment compensation law."

Section 450.25, or chapter 26480, regulates the employment of children in connection with the production of motion pictures in this state.

Section 454.031, or chapter 26655, empowers the supreme court to prescribe qualifications, standards, etc., for admission to practice law and abolishing the diploma privilege.

Section 458.16, or chapter 26684, relates to furnishing reports of mental and physical examinations to the patient and certain others by practitioners of the healing sciences.

Sections 460.29-460.39, or chapter 26929, provides for the licensing of chiropractic hospitals.

Sections 464.011-464.171, 464.18-464.24, or chapter 26797, reorganize and redesignate the state board of examiners for nurses into state board of nurse registration and nursing education.

Sections 502.01, 502.12, or chapter 26968, set standards for milk and milk products and require license for milk dealers.

Chapter 509, F.S., or chapter 26945, reorganizes hotel commission into hotel and restaurant commission and provides for the employment of the commissioner by the governor and the state cabinet.

Section 511.051, or chapter 26939, relates to hotels, apartment houses and rooming houses and authorizes the hotel commissioner to suspend or revoke hotel licenses for permitting gambling therein.

Section 550.065, or chapter 26485, provides for harness racing with pari-mutuel pool and validates certain permits.

Section 550.35, or chapter 26722, regulates the transmission and communication of information relating to horse racing.

Sections 553.01-553.12, or chapter 26904, regulate all installations, repairs and alterations to plumbing in the following counties: Dade, Duval, Hillsborough, Pinellas, Polk, Orange, Palm Beach, Escambia, Volusia, Bay, Marion, Manatee, Jackson, Monroe, Okaloosa and Seminole.

Sections 554.01-554.26, or chapter 26614, create the Inter-American Center Authority in Miami for the development of improved relations and increased trade with the republics of Latin America and other countries.

Section 561.291, or chapter 26773, suspending beverage licenses and hotel licenses of places whose communication facilities have been suspended for violation of law or rule of railroad and public utilities commission concerning bookmaking or other gambling.

Section 561.45, or chapter 26585, relates to the effect on beverage license when school or church established near licensed premises.

Section 585.34, or chapter 26831, provides for state inspection of meat and meat products by the state livestock sanitary board and prescribes for inspection fees.

Sections 601.03, 601.13-601.16, 601.21-601.28, 601.49-601.52, 601.61, 601.0104, or chapter 26492, amend certain sections in the citrus code.

Sections 648.19, 903.36, or chapter 26897, authorize qualified surety companies to become surety to the extent of two hundred (\$200.00) dollars with respect to guaranteed arrest bond certificates of automobile clubs and associations and such certificates to be in lieu of cash bail in the event of certain violations of the motor vehicle law.

Sections 650.01-650.09, or chapter 26841, provide for coverage of certain officers and employees of state and local governments under the social security act and designate a state agency to administer same.

Sections 652.27-652.35, or chapter 26540, authorizing merger, consolidation and conversion of National and State Banks and Trust Companies.

Section 653.81, or chapter 26732, relates to public credit facilities of banks, trust companies and national banks and increases the amount of loans to \$2,500, and interest rate not to exceed 6%.

Section 689.18, or chapter 26927, cancelling and annulling all reverter and forfeiture clauses in conveyances which have been in effect for more than twenty-one years and limiting reverter or forfeiture clause in existing and future conveyances to twenty-one years.

Section 731.34, or chapter 26582, relates to liability of widows' dower in realty and personalty for proportionate share of estate and inheritance taxes.

Section 731.35, or chapter 26948, relates to a widow's election to take dower, by authorizing the guardian of a widow, who suffers under disabilities, to file such election in behalf of the widow.

Section 732.261, or chapter 26914, provides that a divorce invalidates a will insofar as divorced spouse is concerned.

Sections 737.01-737.27, or chapter 26656, relate to testamentary trustees and provide for the procedure of accounting of all trusts created by wills dated January 1, 1952, or later.

Section 741.23, or chapter 26829, abrogating the common law rule relating to liability of the husband for torts of his wife.

Chapter 742, F.S., or chapter 26949, relating to bastardy proceedings by conferring jurisdiction on the circuit court in a chancery to determine paternity and issue orders relating to the support of children born out of wedlock.

Section 745.15, or chapter 26917, setting out certain powers of guardians of incompetents in regards to property owned by entirety.

Section 790.22, or chapter 26946, regulating use of air rifles, BB. guns, and 22-caliber rifles by children under 16.

Section 800.04, or chapter 26580, provides penalty for lewd, lascivious or indecent assault or act upon or in presence of male or female child.

Sections 801.01-801.14, or chapter 26843, provide for the sentencing, commitment, treatment, parole, release and discharge of persons convicted of certain sex offenses against persons under the age of twelve years.

Section 811.021, or chapter 26912, defining larceny and setting out requirements for sufficient charge thereof.

Section 832.04, or chapter 26884, makes it unlawful for anyone with intent to defraud, to secure farm or grove products from the producer thereof for or on account of a check, draft or written order for the payment of money, and stop payment with the intent to defraud.

Section 843.16, or chapter 26886, makes it unlawful for anyone to install radio receiving equipment which is adjusted or tuned to receive messages or signals on frequencies assigned by the federal communications commission to law enforcement officers.

Section 849.09, or chapter 26765, relating to lotteries and setting penalties for the conviction of certain acts.

Section 849.25, or chapter 26847, relates to gambling and defines bookmaking and prescribes penalties for convictions.

Sections 849.26-849.34, or chapter 26543, relate to gambling, gambling contracts and gambling losses and declare void gambling contracts not authorized by law, and provide for the recovery of money and things of value.

Sections 876.11-876.21, or chapter 26542, regulating or prohibiting wearing of masks or hoods, holding demonstrations and burning crosses.

IMPORTANT COURT PROCEEDINGS AND DECISIONS

County Superintendent of Public Instruction—Qualifications

Thomas v. State ex. rel. Cobb et. al., 58 So. 2nd 173—Mandamus directed to clerk of circuit court, Duval County, as clerk of the Board of County Commissioners, etc., to compel re-

spendent to accept payment of relator's filing fee after he had attempted to qualify as a candidate for office of County Superintendent of Public Instruction. Respondent relied on §§231.17, 231.20, 231.24 and 230.25. Peremptory writ of mandamus issued in Circuit Court.

On appeal, affirmed, the court saying that the office of Superintendent of Public Instruction is a county office, created by Constitution, Article VIII, section 6. The legislature is prohibited from adding to or taking from the qualifications of the office as they are stated in the Constitution. Section 230.25, F.S., 1951, (Chapter 26902, Acts of 1951) is invalid and ineffective because it prescribes qualifications for the office in addition to those prescribed by the Constitution. The legislature, not having power or authority to prescribe those additional qualifications for this office, cannot delegate to any board or boards such authority, and §§231.17, 231.20 and 231.24, F.S., 1951, (Chapter 26894, Acts of 1951) are invalid and ineffective insofar as they relate to the office of County Superintendent of Public Instruction.

Election Code

Alexander et. al. v. Booth et. al., 56 So. 2nd 716—Suit by Booth and others to enjoin Alexander and others as members of the Republican State Executive Committee from choosing certain party officers.

On certiorari, decided that National Committeemen and Delegates to a National Convention are party officers and not state officers. Unless controlled or regulated by statute, selection or election of such officers is a party matter. Sections 103.101(7) and 103.121(7) control selection or election of such officers with reference to the Republican Party. The only limitation is that such officers shall be elected "in such manner as may be determined by the State Executive Committee of said party."

State v. City of Miami, 54 So. 2nd 250—City of Miami sued for decree declaring whether it could legally hold a special election on the same day as it was required by law to hold its regular municipal elections for the election of city commissioners. Decree as requested rendered and the state, which had intervened, appealed.

The court found that Chapter 26870, Acts of 1951, (the Election Code of 1951) did not, expressly or by implication, repeal Chapter 23062, Acts of 1945, but that the right of municipalities to hold bond elections on the same day as it holds a regular election is obviously intended to be extended to January 1, 1954. Hence Miami may legally hold a special bond election on November 27, 1951, the same day on which a regular municipal election is to be held.

Eminent Domain

State Road Department v. Forehand et. al., 56 So. 2nd 901—The State Road Department instituted condemnation proceedings against Forehand and others and filed its declaration of taking under Chapter 74, F.S., 1949, which authorizes a proceeding col-

lateral and supplemental to eminent domain proceedings, as authorized by Chapter 73, F.S. Defendants moved to dismiss, challenging the constitutional validity of Chapter 74. The circuit court certified the question to the Supreme Court for determination, under Rule 38, 30 F.S.A.

In the opinion, the requirements of the Constitution, Article XVI, section 29, and D.R. section 12 were considered, and it was decided that "Chapter 74 preserves to the owner every right vouchsafed to him by Section 12, Declaration of Rights, (and) Section 29, Article XVI of the Constitution. . ."

Gambling—Possession of Lottery Tickets

Broadnax v. State, 57 So. 2nd 651—Appellant was convicted of having unlawfully in his possession lottery tickets. Evidence was that defendant-appellant was waiting on customers at a beer parlor for a short period only. The lottery tickets were found in a cigar box under the counter on a shelf where cigarettes and candy were kept. Defendant offered no evidence.

On appeal the Supreme Court reversed, finding nothing in the record to sustain the view that appellant owned, sold or had knowledge or information that the tickets were in the cigar box, and, quoting §849.09, F.S.A., concluded that the state's evidence was legally insufficient to prove possession by the defendant.

Mixon et. al. v. State, 54 So. 2nd 190—Defendants were charged in two counts of violation of the lottery statute, §849.09: (1) by unlawfully conducting a lottery for money, by means of a lottery disposing of money, and by selling tickets in a lottery for money; (2) by having unlawfully and feloniously in their possession certain tickets in a lottery. Upon conviction on both counts, appealed.

The Supreme Court affirmed the conviction on the first count, reversed on the second count, finding there was only one violation of the statute.

Grand Jury—Presence of Persons Not Authorized

Robertson v. State, 52 So. 2nd 337—Robertson was adjudged guilty of criminal contempt for his refusal, before the grand jury of Dade County, to answer questions asked by a special legal counsel employed by the grand jury under authority of Chapter 25765, Laws of Florida, Special Acts of 1949.

On appeal, the Supreme Court, citing *Sullivan v. Letherman*, Fla., 48 So. 2nd 836, 839, held that, under §905.17, F.S., the presence of the special legal counsel was illegal, that, consequently, he had no authority to ask any questions whatever, and therefore could not institute any proceedings for contempt.

State ex. rel. Losey et. al. v. Willard, 54 So. 2nd, 184—Original proceeding in prohibition by State of Florida on relation of Losey, and Rolfe Armored Truck Service, Inc., a Florida corporation. Losey contended that the information under which he was to be tried was void because based on an indictment which was void

because the grand jury that returned the indictment permitted a special investigator, and special legal counsel employed by it under authority of Chapter 25765, Special Acts of 1949, to be present during its sessions and further, because it permitted the special legal counsel to question witnesses and advise with the grand jury; also because it permitted a court reporter selected by it pursuant to Chapter 25478, Acts of 1949, to be present during its sessions, in violation of section 905.14, F.S. The Rolfe Armored Truck Service, Inc., relied on the grounds asserted above and others not included herein.

The Court said: The presence in the grand jury room of persons other than those specifically authorized by statute is highly irregular and not to be condoned. The presence of such persons does not render an indictment ipso facto void. It will, at most, render an indictment returned under such circumstances subject to being quashed on proper and timely motion and give the moving party ground for review by appeal in case of incorrect ruling. Under those circumstances, prohibition is not the proper remedy, for prohibition does not lie to correct errors of a trial court in the exercise of its jurisdiction over the parties and the subject matter. Decided, in view of conclusions above, that the application of relators for writ of prohibition should be denied.

Homestead

Sparkman v. State ex. rel., Scott, 58 So. 2d 431—Statute invalid as an unlawful attempt to alter, contract, or enlarge Section 7, Article X of the Florida Constitution by legislative enactment contrary to the express pronouncements of this court that "Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments".

Medical School—Appropriation for Approved and Accredited

Crow v. Dade County et. al., 54 So. 2nd 753—Class suit by one Crow to enjoin the county from expending proceeds of bonds issued for purpose of extending and improving Jackson Memorial Hospital for the collateral purpose of erecting and equipping a unit of the hospital to be used in part for a medical school. Injunction denied.

On appeal, court affirmed, stating that in voting the bonds, the freeholders gave county commissioners carte blanche to extend and improve the hospital and commissioners have liberal discretion in defining pattern for those improvements. That a hospital and medical school, when both exist, supplement the work of each other, and both become greater assets to the community. That proposal of the commissioners is in line with the best approved methods in the country.

Plumbing Control Act

City of Dunedin et. al. v. Board of County Commissioners of Pinellas County et. al.—(In the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County.) In chancery. Plaintiff, the City of Dunedin, joined by the Town of Largo, sought a declaratory decree holding Chapter 26904, Acts of Florida, 1951, (Chapter

533, F.S.) to be unconstitutional and void as violative of sections 16, 20 and 21 of Article III of the Constitution. They averred that, under the terms of the Act, they, as municipal corporations, were deprived of the privilege of issuing permits for and making inspections of plumbing installations for the health and welfare of their citizens, and were likewise deprived of revenue from the fees for such permits and inspections. They alleged that the Act violated the Constitution, Art. III, Section 16, in that its title was vague, misleading, couched in permissive terms and failed to apprise them of its actual provisions. They also contended that the Act was contrary to the Constitution, Art. III, sections 20 and 21, in that it was in fact a local law attempting to regulate the jurisdiction and duties of county officers, (having been passed without notice) rather than a general law.

The defendants filed answer, denying the unconstitutionality of the Act. The attorney general requested and was granted permission to intervene in defense of the Act's constitutionality; the Associated Plumbing and Heating Contractors of Florida, Inc., likewise sought and was granted permission to intervene.

The matter was argued and briefs submitted.

The Chancellor first determined that the title was adequate to put plaintiffs on notice of the purpose of the Legislature, and that incident thereto certain limitations of prior legislative grants of power over the subject matter were entailed. He next determined that the purpose of the Legislature was to establish a state policy of regulating plumbing contractors to be effective uniformly but not universally throughout the state in those counties having the greater density of population. Then, from consideration statistics of population density in the excluded counties as compared to that of the counties where the Act was operative, he found such a disparity between the densities of the two groups as to present a practical reason for excluding certain counties from the provisions of the Act.

He then decided that the classification basis adopted by the Legislature was reasonable in view of the relation between health and population density.

Motion to dismiss granted.

Note: A petition for rehearing was filed on June 25, 1952, on which no action has been taken.

Practice of Law—Qualifications and Standards

In re Watts, et. al., State Board of Law Examiners, 54 So. 2nd 151—The court ordered and decreed that State Board of Law Examiners may and is authorized to issue certificates of admission to practice law to bona fide citizens of the Negro race who enrolled in an accredited Law School on or before July 25, 1951, as contemplated by Chapter 26655, Acts of 1951, and who received the degree of Bachelor of Laws therefrom within three years from the date of enrollment or within three years from the effective date of Chapter 26655. Further ordered and decreed that the order of October 18, 1948, be revoked and superseded.

Private Wire Service—Regulations

Southern Bell Telephone and Telegraph Co. et. al. v. State ex rel. Transradio Press Service, Inc., 53 So. 2nd 863—The Transradio Press Service prayed for an alternative writ of mandamus to compel the Telephone Company to provide teletypewriter service and connect its Miami office with Radio Station WINZ of Miami Beach and Radio Station WTTT of Coral Gables or show cause for its refusal. Telephone Company answered that it declined to do so because of a letter from the Florida Railroad and Public Utilities Commission prohibiting it from so doing. Radio Station WINZ was permitted to intervene for purpose of seeking relief against the Telephone Company similar to that sought by petitioner. The Attorney General was permitted to intervene in opposition and, in his answer alleged that the Press Service "furnishes and provides racing information to bookmakers and others engaged in gambling or in the furthering of gambling . . ."

Peremptory writ of mandamus issued in the circuit court, being grounded on the exception contained in §365.04, F.S. and the fact that no evidence was produced supporting the allegations made in the answer of the Attorney General.

On appeal; reversed, the opinion stating: Proceedings resisting enforcement of Chapter 25016, Acts of 1949, should be instituted and conducted before the Florida Railroad and Public Utilities Commission; that the quoted provision of §365.04, F.S., does not exempt petitioner from the provisions condemning the use of private wires to disseminate information in furtherance of gambling, etc., and that when challenged by the Commission or the Attorney General, it becomes the duty of the applicant, under §365.11, F.S., to "show that the private wire has not been used, or is not being used, or is not intended for use in the furtherance of gambling."

Sales Taxes

Gay v. Canada Dry Bottling Co., 59 So. 2nd 788—The Bottling Company's practice was to sell its products at a fixed price per case, which included a charge for the bottles and cases as well as the contents, making a cash refund to any one, whether the original purchaser or not, who returned empty bottles and cases in good condition. The question was whether the Bottling Company's purchase of new bottles, cases and component parts thereof for the purpose of packaging and distributing its products was taxable as a "retail sale" under Chapter 26319, Acts of 1949, Ex. Sess., §212.01, F.S. Circuit court ruled that such purposes were not taxable as a "retail sale", and enjoined the collection of such taxes.

The Supreme Court said that the purchase, in similar circumstances, of "non-returnable" or "expendable" containers, i.e., those not returned and re-used by the manufacturer of the product contained therein, and where the cost of the containers affects and adds to the price of the product, is a "purchase for resale", and, under §212.02(3)(a, b), not taxable. However, as in the instant case, where the transaction amounts to the posting of a deposit pending the return of containers it is not a "purchase for

resale" within the meaning of the Revenue Act of 1949, and therefore is taxable as a retail sale. Among other things considered in the opinion, the court referred to the fact that the 1951 Legislature had, by Chapter 26871, Acts of 1951, amended §212.02(3)(b) and thereby clarified its specific intent with regard to such transactions as those in the instant case.

Gay v. Jemison et. al., 52 So. 2nd 137—Suit by enterprisers to enjoin collection of sales taxes on materials to be incorporated in buildings intended primarily for use as housing for military personnel and to be located on land leased from U. S. Government. Injunction decreed by circuit court, and comptroller brought certiorari.

Supreme Court, considering the Federal Statutes concerned, found that the materials furnished by the contractor would not become a part of a public work owned by the U. S. Government, but of buildings of a private enterprise, and therefore were not excepted from sales tax by §212.08(3). Reversed.

Gay v. Supreme Distributors, Inc., et. al., 54 So. 2nd 805—Action by Supreme Distributors to enjoin assessment or collection of sales taxes on transactions where owner (plaintiff) of juke boxes and other coin operated devices installs them in various places of business and operator of such place of business receives a percentage of the gross receipts. Plaintiff's bill of complaint alleged that the agreement between itself and the location operators constituted them joint venturers, and the money received and divided between them was not subject to provisions of Chapter 26319, Acts of 1949, Chapter 212, F.S. The comptroller's position was that the said agreements were contracts for bailment for the mutual benefit of the parties and the funds so received were taxable under Chapter 212, F.S. Injunction issued, the chancellor sustaining the contention of plaintiffs.

On appeal, reversed, holding the "*agreement between the owners of the devices and the location operators is the very heart of this controversy and is controlled by the provisions of Chapter 26319, Chapter 212, F.S.A.*", and that the said agreement (as recited in the bill of complaint) "*fails to set out the essentials of joint adventurers as between the owners of the machines and the location operators as defined by this court in (previous) adjudications*".

School Tax Areas for Issuing Bonds

Smith v. Board of Public Instruction of Brevard County, 56 So. 2nd 713—Suit for declaratory decree to adjudicate validity of provisions of Chapter 26775, Acts of 1951 which authorized Board of Public Instruction of Brevard County to create as special tax school districts, high school tax areas and elementary school tax areas, and to issue bonds and impose ad valorem taxes on the lands therein to pay interest and principal on said bonds. Circuit court pronounced statute valid and dismissed the bill.

On appeal, the court found that while there was no objection to the legislature pyramiding school districts in the manner proposed by Chapter 26775, the Constitution, Article XII section 10, limited the taxes such districts could impose for free public school

purposes to such amount that (when added to those imposed by special school tax district No. 1) would not exceed ten mills, and Article XII, section 17, limited the bonded indebtedness to that which (when added to indebtedness issued by special tax district No. 1) would not exceed 20 percent of the assessed value of the taxable property of such district according to the last assessment for state and county purposes prior to the issuing of such bonds.

Small Claims Court—Substitute or Relief Judge

In re Advisory Opinion to the Governor, 58 So. 2nd 319—The Governor propounded two questions to the court, regarding procedure and substitution of judges of small claims courts created by local or special acts upon entry of an order of disqualification of a judge of such court or courts.

The Justices of the Supreme Court advised that F.S.A. §38.09 relating to designation by the Governor of judges to relieve judges disqualified applies to judges of small claims courts created by local and special acts where the local or special acts make no provision for substitution of judges; that Chapter 26920, Laws of Florida, 1951, does not apply, and, upon receiving an order of disqualification of a judge of such court, the Governor should designate another judge (or justice of the peace) of a court having jurisdiction of cases where the demand or value of the property involved is at least as great as that of the small claims court to which assigned.

State Universities

State ex rel Hawkins v. State Board of Control, 47 So. 2nd. 608; 53 So. 2nd. 116; 60 So. 2nd. 162—This was an original proceeding in the Supreme Court of Florida in Mandamus to compel admission of a negro to the law college of the University of Florida. In the Florida Supreme Court's first opinion it was held that the plan of the Board of Control set up in its answer, when carried out, would satisfy all lawful rights of the petitioner. 47 So. 2nd. 608.

Later the petitioner renewed his request for peremptory writ, the return, notwithstanding, alleging that the Respondent had failed to provide petitioner with equal educational opportunities. The Court again denied the petition on the ground that petitioner had made no showing entitling him to the relief. The Court retained jurisdiction in order that either party might make proof that equal opportunities and facilities had, or had not, been provided for the petitioner. 53 So. 2nd. 116.

Thereupon, the petitioner filed his petition for Writ of Certiorari in the Supreme Court of United States. It was denied by the latter Court because the Florida Court's judgment was not a final judgment. 96 L. Ed. 65.

In May 1952 petitioner filed a further motion for peremptory writ, in which he declined to proceed further and demanded final judgment. Florida Court again found petitioner had failed to submit proof as to equality or inequality of opportunities provided for him at the Florida Agricultural and Mechanical College for

Negroes. The Court denied the motion for peremptory writ, quashed the alternative writ, and dismissed the case. 60 So. 2nd. 162.

From that final judgment Hawkins again filed a Petition for Writ of Certiorari in the Supreme Court of United States, and the case is now awaiting adjudication by that Court.

City of Gainesville v. Board of Control—In 1905, when there was keen competition between several cities for the relocation of the University of Florida, one of the offers of the City of Gainesville was to supply free water to the University. Water has been supplied without charge until recently, when the City decided to discontinue free water, and to charge the University for all water supplied at the estimated cost. The City contends that the agreement to furnish free water was void. The Board of Control refused to pay for the water, and in October, 1952 the City brought suit to determine its rights under the circumstances. The case is now pending in the Circuit Court of Leon County.

THE OFFICE OF ATTORNEY GENERAL IN FLORIDA

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General is his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such power and authority as public interest may require. *State ex rel Landis, Attorney General, et al vs. S. H. Kress & Co.*, 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be the Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the Supreme Court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the State of Florida (§16.01).*

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01 and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Call a biennial session of circuit judges to consider their report on desirable or necessary legislation (§16.06).

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the Statutory Revision Department, which also includes legislative bill drafting (§16.43-16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).

11. Report the decisions of the supreme court, have them prepared in printed volumes and keep one copy of each in his office (§§25.29, 25.30).

12. Devise and furnish a form of seal for circuit court of the state (§26.48).

13. Prepare and cause to be printed copies of fee bills of the various officers of the several counties of the state and to send copies of same to such county officials (§58.07).

14. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).

*Reference is to Florida Statutes.

15. Conduct condemnation proceedings on behalf of the Board of Commissioners of State Institutions and on behalf of the adjutant general's office for military purposes (§73.22).

16. Conduct quo warranto proceedings (§§80.03, 875.19).

17. Represent the state in proceedings under the Declaratory Judgment Law where the constitutionality of statutes is involved (§87.10).

18. Devise a suitable seal for the supervisors of registration (§98.341).

19. Approve title to real estate in which the state is interested (§135.16).

20. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy Act lands (§196.21).

21. Assist in the collection and enforcement of chain store license taxes (§204.13).

22. Prepare contracts for purchase of uniform school books (§233.16).

23. Approve school district bonds (§236.48).

24. Prosecute violations of school budget law (§237.23).

25. Legal advisor to board of trustees of the Teachers Retirement System (§238.03 (9)).

26. Represent Board of Control in Eminent Domain proceedings (§240.14).

27. Act as ex officio member and legal advisor of the State Defense Council (§249.03).

28. Conduct condemnation proceedings on behalf of the Armory board (§250.40).

29. Pass upon and approve regulations of district drainage boards (§298.53).

30. Act as legal advisor for the State Road Department. Said department, however, has a special attorney authorized by statute (§341.17).

31. Act as attorney for the Railroad and Public Utility Commission (this work is negligible because of the fact that the Railroad and Public Utility Commission has authority to employ its own special counsel.) (§§350.29, 350.30, 350.62, 350.66).

32. Assist Railroad and Public Utilities Commission in making investigations relating to the regulation of private wire service (§§365.06, 365.07).

33. Give special attention to legal proceedings in connection with the sponge fishing industry (§373.22).

34. Attend to all legal business arising in connection with the laws governing the salt-water fishing industry (§373.22).

35. Conduct suits on bonds of state health officer (§381.10).
36. Enforce the Vital Statistics Law (§382.37).
37. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).
38. Represent the state in disbarment proceedings in the supreme court (§454.28).
39. Assist in the enforcement of the Basic Science Law (§456.22).
40. Assist in the enforcement of laws regulating the practice of optometry (§463.19).
41. Represent the state board of architects in judicial proceeding to which the board may be a party, however, the board is authorized by statute to secure other legal advice or service (§467.14).
42. Approve the form for bonds of nonresident outdoor advertisers (§479.06).
43. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).
44. Assist in the enforcement of laws regulating small loan businesses (§516.23).
45. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).
46. Investigate and rectify commercial discriminations (§§540.02-540.05).
47. Enforce the anti-trust laws of the state (§542.03).
48. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).
49. Prosecute combinations against Florida meats (§544.02).
50. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).
51. Act as attorney for the State Racing Commission. Said commission, however, has statutory authority to employ its special counsel (§550.01).
52. Represent the commissioner of agriculture in connection with the enforcement of Florida seed certification law (§575.08).
53. Enjoin violations of the laws regulating commercial food-stuffs (§580.19).
54. Act as legal advisor and attorney for the State Plant Board (§581.02).
55. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

56. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

57. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

58. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and non profit cooperative associations (§§618.23, 619.09).

59. Sue to recover fines for doing business without a license (§625.17).

60. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

61. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

62. Represent the insurance commissioner in connection with insurance matters (§§637.54, 640.13).

63. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§655.10).

64. Bring proceedings to recover escheated property (§731.33).

65. Bring proceedings to forfeit prize money in lotteries (§849.12).

66. Conduct extradition hearings for the governor (§941.04).

67. Act as attorney for the Parole Commission (§947.11).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of Commissioners of State Institutions (Fla. Const. §17, Art. IV).

2. State Board of Education (Fla. Const. §3, Art. XII, §229.03, Florida Statutes).

3. Trustees of Internal Improvement Fund (§253.02, Florida Statutes).

4. State Board of Drainage Commissioners (§298.69, Florida Statutes).

5. State Budget Commission (§216.01, Florida Statutes).

6. State Board of Conservation (§§373.01, 377.07, Florida Statutes).

7. State Board of Pardons (Fla. Const. §12, Art. IV).

8. State Canvassing Board (§102.111, Florida Statutes).

9. Florida Securities Commission (§517.03, Florida Statutes).

10. Railroad, etc., Assessment Board (§195.01, Florida Statutes).

11. Board for fixing values of investment securities of trust companies (§655.10, Florida Statutes).

12. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16, Florida Statutes).

13. State Housing Board (§424.04, Florida Statutes).

14. Department of Public Safety Executive Board (§321.01, Florida Statutes).

15. State Board for Vocational Education (§229.08, Florida Statutes).

16. State Textbook Purchasing Board (§233.13, Florida Statutes).

17. Member of State Civil Defense Council (§252.05, Florida Statutes).

18. Governor's Cabinet (Fla. Const. §20, Art. IV).

STATUTORY REVISION DEPARTMENT

The 1943 Legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., Florida Statutes). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.26-16.291, 16.43-16.51, Florida Statutes), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundances and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by revisers' bills to be submitted to each session of the Legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Volume I,

Florida Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the Legislature.

(4) Preparing and having printed from time to time such number of copies as may be required of supplements to Volume II and III of Florida Statutes, securing copyrights on same and reedit and republish same when necessary.

(5) Carrying on a continuous reworking of the general index to Volume I in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) To make a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general who, under authority of §16.43, Florida Statutes, selects

a director. The director has the direct supervision and control of the department, who with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of revisers' bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Annotating and related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the Legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The revisers' bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of revisers' bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning only one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation or jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning only one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes as carried forward in the back of Volume I, or Volumes II and III.

In the compilation of material and the drafting of revisers' bills, the following rules and procedure are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

- (2) A careful search is made for:
 - (a) Inappropriateness of run-in lines to sections.
 - (b) Misspelled words and poor punctuation.
 - (c) Statutes limited as to time of operation and which have expired.
 - (d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.
 - (e) Laws that have become obsolete.
 - (f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.
 - (g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.
 - (h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.
 - (i) Sections that, because of amendments and additions to the statutes, should be renumbered and placed in different sequence.
 - (j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.
 - (k) Conflicting powers and duties of officials.
 - (l) Repetitious statutes.

The department carries continuing notes extracted from the annotations as to the construction, operation, validity or constitutionality of the laws; maintains a running file containing a list of errors, suggestions, etc., that are submitted by other persons; and maintains a system of keeping comprehensive notes and data for the final preparation of the revisers' bills. In the preparation of revisers' bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

COMPILED STATEMENT OF CASES HANDLED IN THE ATTORNEY GENERAL'S OFFICE

(From Jan. 1, 1951 Through Dec. 31, 1952)

CIVIL CASES

Number of cases pending January 1, 1951	194
Number of cases docketed between Jan. 1, 1951 and Dec. 31, 1952	
Docketed and still pending (1951-52)	222
Docketed and closed (1951-52)	156 378
	572
Number of cases disposed of between Jan. 1, 1951 and Dec. 31, 1952	
Pending January 1, 1951—closed	85
Docketed and closed (1951-52)	156 241
Number of cases pending January 1, 1953	331

CRIMINAL CASES

Number of cases pending January 1, 1951	105
Number of cases docketed between Jan. 1, 1951 and Dec. 31, 1952	
Docketed and still pending	140
Docketed and closed	349 489
	594
Number of cases disposed of between Jan. 1, 1951 and Dec. 31, 1952	
Pending January 1, 1951	105
Docketed and closed	349 454
Number of cases pending January 1, 1953	140

TOTAL CASES

Total civil and criminal cases pending or docketed during biennium ending December 31, 1952	1166
Total civil and criminal cases pending or disposed of during biennium ending December 31, 1952	695
Total civil and criminal cases pending January 1, 1953	471

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Supervisor of registration, Broward county; compensation as custodian of voting machines.	051-13
Health commissioner, Dade county; salary.	051-14
Justice of peace; court attendance fees.	051-15
Board of control; workmen's compensation, contribution to expense of.	051-17
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Tax assessor and tax collector, Liberty county; compensation.	051-22
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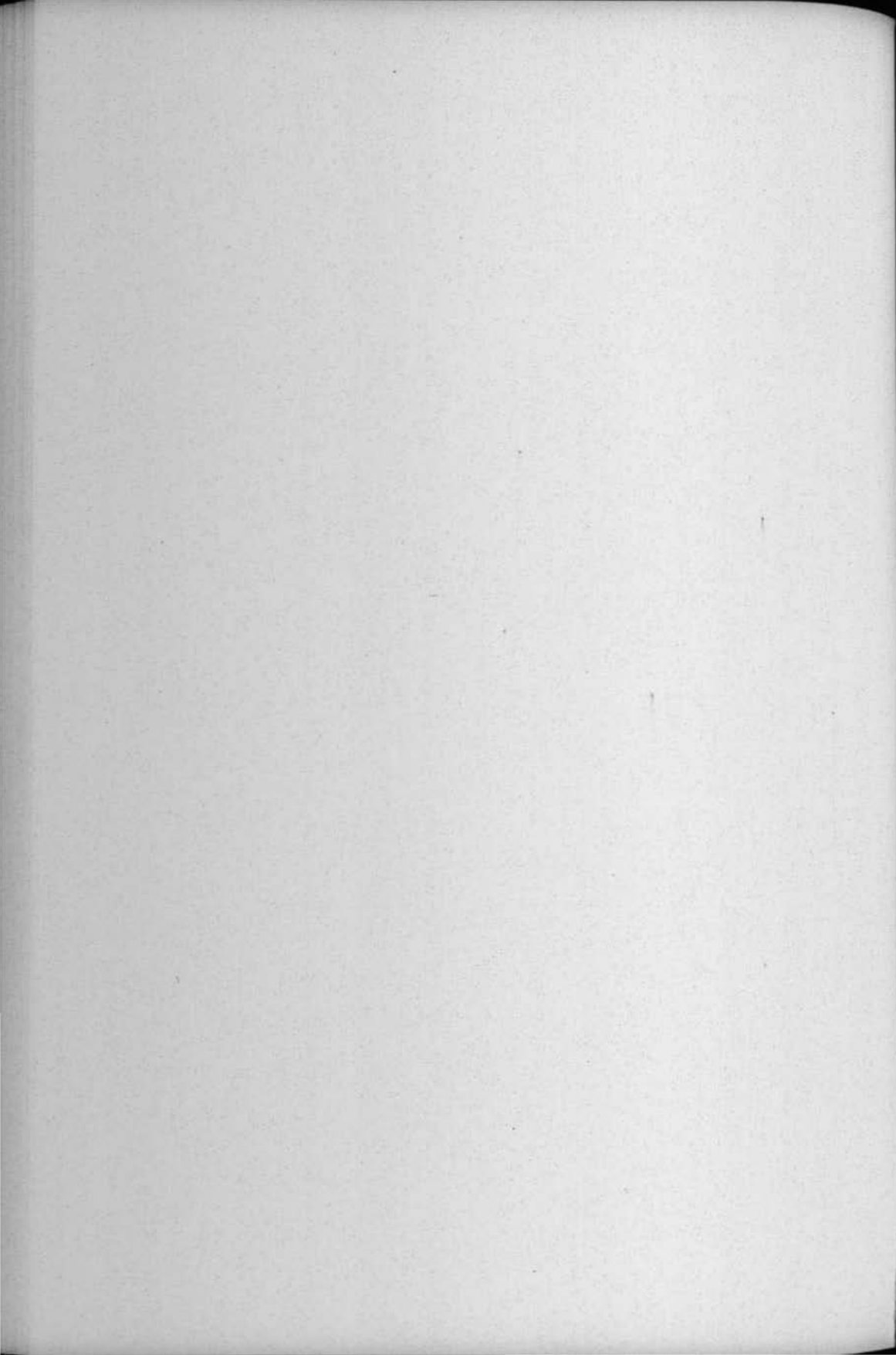
1952

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